IN THE

SUPREME COURT

OF THE

UNITED STATES,

October Term, A. D. 1884.

ADAMS COUNTY, Plaintiff in Error,

vs.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY ET AL., Defendants in Error.

ERROR TO SUPREME COURT OF IOWA.

BRIEF OF PLAINTIFF.

GEORGE G. WRIGHT,
FRANK M. DAVIS, } Counsel for Plaintiff.

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STATEMENT OF FACTS.

PLEADINGS, ISSUES, TITLES, PROCEEDINGS, &C.

In 1869 Plaintiff filed its petition in equity in the District Court of Adams County, Iowa, praying a decree to quiet her title to sixty-six forty acre tracts of land, situated in said county, against defendant. The plaintiff claimed the ownership of the land under the swamp land grant of Congress to the State of Arkansas and other states of the 28th of Sept. 1850, the provisions of which are specifically plead (folio 2-5.) Also under an act of the Legislature of Iowa passed Jan. 13th, 1853, granting said lands to plaintiff. It is averred in the petition that each forty acre tract was swamp land in fact; and that under directions of the Secretary of Interior and Commissioner of the General Land Office the lands which are specifically described by numbers were duly selected as swamp by the county Judge and Surveyor, and reported as such to the surveyor General of United States for Iowa, on the 29th day of May,, 1854, and were by him reported to the Local, and General Land offices and that they were on the 30th of September 1854, duly and regularly marked as land, disposed of and "reserved from sale" on the plat and tract books of the local office at Council Bluffs, and the general land office at Washington City, and from that date said lands were reserved from private entry. It is further specifically and set forth that Congress by the act of March 3d, 1857, confirmed the specific description of lands thus selected and reserved from sale to the state of Iowa which confirmation inured to Plaintiff and that Plaintiff took possession and exercised control over them since said dates. And it is further alleged under the practice in Iowa requiring plaintiff to set up the grounds of the defendants claims if known in such cases, that the defendant makes the claim that the said lands inured to defendant, under the Iowa Rail Road grant of May 15th, 1856, and that the Commissioner had certified the said lands to the State of Iowa for Railroad purposes under which defendant claimed the same. And it is averred that defendants claim is unfounded and void because defendant had not made any definite location of the line of their road till after the date of the confirmatory grant of March 3rd, 1857, and it is further averred that the lands were not included in the Rail Road

grant; but were specially reserved from said grant by the 3rd proviso of the first section of the Rail Road grant. It is further alleged that the commissioner's certificate to the state under the rail road grant is null and void for want of authority to make it and was unlawfully made by *mistake* of the commissions through *fraud* and through the collusion of defendant, etc.

For Answer defendent in May 1870 puts in issue all the allegations of the petition, and by cross petition alleges that it claims title under the Iowa rail road land grant of May 15th 1856 which is specifically plead, and prayed to have its title confirmed and quieted, (folio 6-7)

By an *amended answer*, and cross petition filed in May 1871 defendant avers.

1st. That the land is dry arable land, and was not swamp land and that the county officer acted fraudulently in making the selections, and

2nd. Further specifically sets forth that on the 25th day of October 1861 the *defendant* had caused the claims of *plaintiff* to be submitted to the commisioner for a final adjudication and that after a careful examination the commissioner rejected plaintiffs claim and afterward certified the lands to the state and to defendant for rail road purposes. And that upon such certification the plaintiff abandoned all claim to said lands and its officers listed and taxed them to defendant as defendants lands and had regularly each year after such certification collected the taxes from defendent as an owner. And that in a certain compromise of taxes made in June 1869, for the taxes of the year 1861 to 1868 then delinquent the plaintiff remitted a portion of the delinquent taxes and defendant paid plaintiff ten thousand dollars for taxes on certain land of defendant the lands in suit being included in them that defendant had been exercising act of ownership over the land and that by such taxation by its officers the plaintiff had recognized defendant as the owner of the land for the last six years. Also defendant plead in abatement that plaintiff had sold and conveyed by a deed all its interest to the American Emigrant Company.

The prayer is to have defendants title quieted, and in case the court should find the ownership of the lands in plaintiff,

then that the court ascertain what taxes defendant had paid plaintiff and give a decree refunding the same.

For *answer* to the *cross-bill* and reply the plaintiff denied all the allegations of the cross-bill and averred that the selections were made in good faith by *de-facto* officers, that the pretended adjudication of the commissioner was had and made at the instigation of defendant and *ex parte*, without any authority of law, without notice to the state or plaintiff and without jurisdiction of the parties or subject matter, through fraud and corruption known to defendant and that his act were in violation of law and "null and void," further alleged that the lands were duly selected and reserved from sale before the passage of the act of May 15th, 1856, and before defendants line of definite location was filed or adopted. That before defendants made a definite location of the line of their road. Congress had waived all irregularities and confirmed the land as selected and that it was not competent for defendants to go behind this confirmatory grant. That the title to the lands was yet in the United States and no taxes could be levied upon them by the laws of Iowa that if any taxes were levied upon said lands it was done by mistake of the taxing officers and that all taxes thereon were illegal and void, and contrary to the laws of Iowa, that plaintiff had always denied defendants claims on said land and had been waiting for a patent to be issued from the United States according to law and had always claimed to control said swamp lands (folio 10 and 11.)

Upon the trial of the cause then the District court rendered a decree for plaintiff on the merits and gave defendant judgment for $93 dollars taxes paid for the year 1869 (folio 12 to 62) The defendant appealed to the supreme court, which reversed the decree of the lower court in an opinion by Cole justice upon the plea of abatement and also contended that perhaps an estoppel existed, by reason of the certification to defendant and payment of taxes. Upon a rehearing the court by Miller, justice abandoned the abatement, but again reversed the case on the estoppel plea. The estoppel opinion was based on the two propositions.

1st. That there had been in fact an adjudication between the parties and contest before the commissioner of the General Land

Office, Oct. 25th, 1861, who had decided against plaintiffs claims and rejected them and immediately thereafter had certified the lands to the state for defendants use.

2d. That on the 10th day of June, 1869, in a certain agreement to compromise a large amount of delinquent taxes on lands actually owned by defendant in the county, that plaintiffs had, knowingly and purposely included the lands in suit and received taxes thereon of defendant. That such act was a recognition of the validity of the defendants claims and estopped plaintiff to claim the lands. The case was remanded and in the lower court plaintiff filed an amended reply in answer to defendants cross bill in substance as follows:

AMENDMENT TO REPLICATION TO AMENDED ANSWER AND CROSS-BILL.

(Record folio 64 72).—Avers that plaintiff officers had no authority of law to tax selected swamp lands before a patent had been made from the United States. That the Supervisors had no knowledge or information on the 10th of June, 1869 that the taxing offices had placed auy selected swamp lands in the Rail road list. That such taxation was indirect violation of laws of Iowa. That such taxation if any existed was wholly unknown to the supervisors. That the defendant did not present any list of lands they owned. But the compromise covered generally such lands as had been granted by Congress and the legislature of Iowa to defendant. That the lands in suit were reserved from such grant and were not included in the agreement of compromise (folio 54). That such taxation, if it existed, was by inadvertancy and mistake. That no part of the compromise money was paid for any taxes on the lands in suit. That all the taxes on the lands in suit had been expressly taken off the tax list and were not included in the compromise estimate. That the committee of the supervisors who were appointed to estimate taxes on defendant's lands at the time of said compromise found that there were $28,867 of delinquent taxes on the tax list nominally against railroad lands, but the committee struck off all the swamp lands, some school lands, homestead lands, and other public lands, and estimated taxes only on land certainly known to be railroad lands in the amount of $22,610, omitting over six

thousand dollars of delinquent taxes which had by the errors and ignorance of the township taxing offices been assessed and thrown into a general list of "unknown lands." That all lands the title to which were unknown were on the tax list as "owners unknown," and not to defendant. Some of the lands in suit had been in this unknown list from 1858, and also the railroad lands were in the same list as unknown up to 1866. That two years after the compromise the defendant's agents corruptly procured the county treasurer to mark the lands on the tax list as "tax remitted" under the compromise. That such marking was secretly and corruptly procured to be done a year after this suit was begun, and thereupon defendant filed the amended cross bill setting up a claim of paying taxes for the first time. That the supervisors who made the compromise went out of office before this marking was done, and the county treasurer who did this act went out of office a few days after, and at the time the estoppel plea was filed no officer in the office could give or knew any of the real facts relating to such act, and they were not discovered till 1874, after this cause had been remanded from the first appeal.

Specifically sets forth the fraudulent conduct of the Commission of the general land office in certain correspondence about the lands in suit between plaintiff and himself through Senator James Harlan.

Specifically pleads Joint Resolution No. 17 of the General Assembly of Iowa in 1862, disclaiming all title under Railroad Grant, and the certificate to the state of the lands in suit for railroad purposes. Also the opinion of the Attorney General of Iowa, that 30,000 of the railroad lands on which the $22,610 taxes existed was a just and proper tax against defendant. That plaintiff has always claimed the lands in suit and been in control of the same. Avers that congress has sole power to dispose of the public domain, and plaintiff calls into question the competency and jurisdiction of the Commission of the general land office, and the state taxing offices, and the state courts to transfer by illegal taxation and the other illegal acts set forth the lands in suit from the Swamp Land Grant to the Railroad Grant, in defiance of the Acts of Congress and before the title had issued. And

further that the lands were exempt by the laws of Iowa from taxation, being public lands held for a public purpose. That the supervisors who were the county agents by law, had never directed the taxation of said lands nor consented to it; and if such taxation had existed it was done by inadvertency and mistake of inferior offices; that there was no records in the county to show exactly what lands actually belonged to defendant, who at that time actually owned about 42,000 acres in the county, not including any claim on the lands in suit; that the board of supervisors of the county are its legal agents and not the taxing offices; that the supervisors in no manner and at no time changed their policy with reference to the lands in suit, but that some of the lands in this suit had been on the tax list as "Unknown" from 1858 up to the date of the compromise; that there were delinquent taxes on the tax list prior to 1861, as follows: For the years 1858, 1859 and 1860, on swamp lands, $105.64; on railroad lands for the same years, $3,568.35; and from the years 1861 to 1868 inclusive there were delinquent taxes on the railroad lands to the amount of $23,921.57, and for the same years on swamp lands of $1,271.80, making an entire sum for all the years from 1858 to 1868 of $28,867.56. That the compromise only included the taxes for the years 1861 to 1868, and that the supervisors omitted from the estimate all taxes for the years 1858, 1859 and 1860, and omitted the $1,271.80 taxesson swamp lands, and then omitted a large sum on other lands not certainly known to be railroad lands, reducing the amount to $22,610, which was found to be due on railroad lands actually included in the Rail Road grant.

It also sets out at length the circumstances attending the alleged adjudication by the land department at Washington, showing that it was *exparte*, without notice to the state or any one, other than railroad agents and officers, that such action was utterly illegal, fraudulent and void, etc., (folio 68-70); also that defendant after the joint resolution, 17 acts of 1862, abandoned all claim to these lands; that the county made contracts for their settlement and reclamation, that it has always claimed the lands, kept a record of their location, permitted their pre-emption, protected them against trespassers, to own, occupy and possess the same; that the state has no right by operation of tax laws to transfer

these lands; that a certain described 40 acres of the lands, to-wit, se se 11, 73, 34, was never certified to the railroad company, but was to the county; that another 40, to-wit, ne ne 3, 71, 34, was not rejected from the swamp land lists, but was included by mistake in the railroad lists, which under the commissioner's direction was corrected and afterwards patented to the state as swamp and conveyed by the state to the county, after the compromise of taxes and before the amended cross bill was filed; that the lands in suit were marked "reserved" on the plat books of the local land offices of the United States on the 23rd of October, 1854; that they were expressly excepted from the operation of the railroad grant; that the certificate of the lands to the railroad company is void; that by the acts of Sept., 1850, and of March 3, 1857, and others, the United States and the State of Iowa disposed of these lands and vested them in the county as swamp lands. Other matters are also set up which however need not here be referred to more at length, (71, 2).

This amendment was on defendant's motion stricken from the files, and a decree rendered against complainant, based upon the opinion of the supreme court; from this decree complainant appealed, and it was reversed. This was upon the ground that complainant under the circumstances had the right to amend its pleading and be heard upon new and further evidence, (folio 1058-1065.

The case being remanded eastern mortgagees or trustees, were made parties, and the case submitted upon full evidence, that before taken as well as much taken after, (folios 77 to 1035,) and a decree rendered decreeing complete title and guaranteeing the relief prayed for in the cross bill, (the grounds for this conclusion will be found in a so called bill of exceptions and the decree, for which see folios 1035 to 1039).

This decree was affirmed in October 1879, (folio 1043,) rehearing asked and granted and first opinion adhered to and final decree rendered in December 1880, (1044). The original opinion as well as that upon re hearing will be found in folios 1046 to 1082. It will be seen that the court held that the ground upon which the court below proceeded in decreeing

the title was not tenable; but held that complainant in the second hearing in the court below was limited to the trial of the new issue, to-wit: that the assessment and collection of taxes was made by mistake; and finding this issue against complainant, affirmed the decree. This is substantially the ground of both opinions. The appeal to the court was perfected Feb. 7th, 1881.

We have thus made a quite complete synopsis of the record so far as relates to the pleadings, and successive hearings in the several courts, that your honors might have its history in a condensed and corrected form and thus know at a glance upon what grounds the parties respectively stand. The evidence will be referred to in the brief and the argument to follow, somewhat in this paper, but more at length at bar.

BRIEF ON MOTION TO DISMISS.

It will be seen that the county claims title under the Swamp Land Act of 1850 and the railroad primarily and principally under the grant of May 15, 1856.

The county thus claims "title, right or privelege" under a federal statute, and the decision by the supreme court of the state was against the title right or privilege so "specially set up as claimed under such statute," and as a consequence may be re-examined by this court. Rev. Statutes ss. 709.

Appellee, however, moves to dismiss the appeal, upon the ground that the court below, in its opinion, held against appellants title, not because of any claim or want of right under the statutes, but because of matters subsequently arising whereby the county estopped itself from any claim it might have had originally. And thus it is insisted that there is no re-examinable federal question in the court. This properly first merits attention.

We say:

(*a.*) The case necessarily draws in question the statute of 1850 and rights thereunder.

(*b.*) We claim title under a statute of the United States and the decision is *against the title so set up under such statute.*

(*c.*) It matters not upon what ground the court below may have reached its conclusion overt urning our title, the fact remains

that the decree was against that title "specifically set up or claimed," under that statute.

(*d.*) If the jurisdiction of this court can be defeated, in a case clearly within the letter and spirit of the statute, by the reasoning of an opinion, then it would be in the power of the state tribunal in any and every case, however untenable, ridiculous or absurd the ground, to prevent an appeal and defraud a party of a right clearly provided for in the statutes.

(*e.*) The question is what was decided, what right was denied, what *title* set up or *claimed* under the statute, was held invalid by the *decree*, by the *judgment* of the court, what was the right or title ultimately and finally and conclusively passed upon and denied us; and not what were the *reasons* for such denial or conclusion, and neither the injection of other issues nor their determination can make the claims other than one made under the statute; nor its denial any the less a loss of a right or title to which we were entitled by such statute. Icidental or irrelevant issues or matters are of no avail. The question is, what was the title claimed, and under what statute; and was the decision against that right. These views are in accordance with the logic and language and philosophy and purpose of the statute and as we insist with the decisions.

It is the decision against the title set up, with reference to the treaty (statutes,) and not the mere abstract construction of the treaty (statute) upon which the statute intends to found the appellate jurisdiction.

How can it be possible to decide whether a title be within the protection of a statute until it is ascertained where the title is and whether it have a legal validity.

If the court below should decide the title to be bad and therefore not protected by the statute, certainly this court must have the power to decide it to be good and protected by the statute.

The question—the primal question—is as to the construction of the statute, as to a title specifically set up by us, and every error that immediately respects that question—that title must as a matter of course be within the cognizance of the court. If this

is not so, then the case in its true light, and in respect of appellant's just claim and rights, could never be presented on appeal.

The decision to our prejudice may have been the result of those very errors or defects in state jurisprudence against which the constitution intended to protect the individual.

The title is the primary object to which the attention of the court is called in every such case, for the words are: "and the decision be against the title."

Martin vs. Hunter, 1 Wheat. 304.
Smith vs. Maryland, 6 Cranch 286.
Williams vs. Bruffy, 12 Otto, 248.

This court has jurisdiction wherever a party claims under title, right or privilege or exemption under an act of Congress and the decision is against such right.

Montgomery vs. Hernandey 12 Wheat. 129.
Owings vs. Northwood, 5 Cranch, 348.
Armstrong vs. Adams County, 16 Pet. 285.
Miller vs. Nichols, 4 Wheat. 311,

The very object of the writ is to ascertain whether the court decided right or wrong, and the jurisdiction to so review arrises not from the error of the court below, but the subject matter; which is a claim set up under the statute or some federal authority.

Neilson vs. Lagow, 7 How. 775.

We show, or claim to have shown a title under a federal statute, and the judgment is indisputably against the right so claimed. This is the record, and hence reviewable.

Hickie vs. Starke, 1 Pet. 94.

The court below must have misconstrued the Act of Congress, and did hold against us in the face of that statute. For if the county held these lands under the Act and the grant of the state, then,since title was never certified, there was no power to tax them and to hold that the county was estopped its claim, was to strip the grant of force and take title from the county, state and government, before it had or could become subject to taxation. To answer this by saying that it had been certified to the railroad company and was therefore taxable, begs the question,

for that is one of the questions raised under the statute which we say was misconstrued, and under which we claim.

None of the objections made to our title other than those based upon the grant of 1856 to the railroad company, furnish an answer to our action, and though the other matters thus raised may not be re-examinable here, yet since they, as suggested, fail utterly as answers, the single claim under the statute, which was denied us alone remains for review here and of this there is undoubted jurisdiction.

Maguire vs. Tyler, 8 Wall. 654.

PROPOSITIONS OF LAW.

1st. The swamp land grant of September 28th, 1850, was a grant *in presenti*. But the legislature of the state could not make a title to any of the lands until a patent from the United States was made and delivered to the state.

Opinion of Attorney General Black, 1st Lester Land Laws No. 595, dated Nov. 10, 1858; *Railroad Co. vs. Smith*, 9 Wall 99.

VOID TITLES.

2d. A patent or certified list of lands under the acts of congress designed to convey title to public lands of the United States, which is issued in violation of the laws of the United States or by fraud, mistake or misconstruction of law, and for lands not intended to be included in the grant by congress, is utterly null and void, and conveys no title, right, claim or interest whatever; and the United States or any contesting claimant for the land may have relief in a court of equity.

Revised Statutes, Sect. 2449,
Moore vs. Robbins, 96 U. S. 530,
Best vs. Polk, 18 Wallace page 112-117,
United States vs. Stone, 2 Wall 525-535,
Stoddard vs. Chambers, 2 Howard 318,
Easton vs. Salisbury, 21 Howard top 432,
Morton vs. Nebraska, 21 Wall 675,
Sherman vs. Bruick, 93 U. S. 209,
Richart vs. Felps, 6 Wall 160

TITLE REMAINS IN THE UNITED STATES.

3d. In all cases where the ministerial officers of the government make patents to lands or certified list of lands, without

authority or contrary to law, and such patents or certified lists are void by reason of such want of authority or illegality, the title to the lands remains in the United States until a proper or legal patent is made.

Morton vs. Nebraska, 21 Wall. folio 674

FEDERAL QUESTIONS.

4th. When both parties claim under Act of Congress and set them up in the pleadings and rely upon them, and a decision is made against one; a federal question is necessarily presented which this court must act upon.

Minnesota vs. Batchelder, 1, Wall. top 116.
Moore vs. Robbins, 96 U. S. 531.
Johnson vs. Towsley 13, Wall. 80.
Lindsay vs. Howes, 2 Black. 558—559.

JURISDICTION IN WRITS OF ERROR.

In Murdock vs. Memphis 20, Wall. page 628 Miller J. for this court gives the rule as follows: "It has been many "times decided on motions to dismiss this class of cases for want of "jurisdiction, that if it appears from the record that plaintiff in "error raised and presented to the court by pleadings or other "appropriate methods one of the questions specified in the "statutes, and the court ruled against him, the jurisdiction of "this court attached, and we must hear the case on its merits."
Citing: *Rector vs. Ashley*, 3 *Wall.* 142
Furman vs. Nichols 8 *Wall.* 44.

In *Armstrong vs. Treasurer*, 16 *Peters* 281, it is held that the Federal question: 1st—May be shown by express averment or necessary intendment in the pleading. 2d—In equity it may be stated in the final decree. And 6th—It may appear that the state court could not have given the judgment or decree passed without deciding such question."

In *Williams vs. Norris*, 12 *Wheat.* 117, Marshall, C. J. says that "notwithstanding there was a statute of the state requiring the written opinion of the state courts to be filed "among the papers of the case; yet the *opinion* of the state court "filed in writing among the papers constituted no part of the "record and could *not be looked to* as the foundation on which

"this court would take or refuse jurisdiction." And in *Rector vs. Ashley*, 6 *Wall.* 148, this court approves the above decision and proceeds to say: "That leaving out the opinion of the state "court there is nothing in the record before us, to show that "the decree decided any other controverted proposition than the "validity of the title set up by Rector, which was dependent on "the Act of Congress of Feb. 17th 1815 and the decision was "against the claim set up by him under that statute. It is "therefore a proper case for a writ of error under the 25th sec. "of the judiciary Act."

In Murdock vs Memphis, 20 Wall., bottom page 633, top 634 the court say, "and though we have repeatedly decided that opinions of state court (except Louisana) cannot be looked into to ascertain what was decided we see no reason why * * We should not so far examine those opinions as may be useful in determining the question."

We have been in the habit of receiving the certificate of a chief justice "as to the federal question; but not as conclusive, and "and their opinions are quite as satisfactory and may be more "properly treated as part of the record than such certificates. But "after all the record of the case, its pleadings, bills of exception, "judgment evidence, in short its record whether at law or equity "must be the chief foundation of the inquiry."

It is not necessary that the record should show *in ipsisimis verbis* that the state court decided a federal statute invalid If a a title is claimed under the statute and the decision is against the title, in its elementary grounds. If from the nature of the case the state court in arriving at the result of its judgment, in the exercise of its functions, assumed a state of facts or assumed propositions of law annulling or denying federal rights which by necessary intendment entered into the final judgment the jurisdiction vests.

Murray vs. Charleston 96 U. S. 441
University vs. The People, 99 U. S. 319.
Furman vs. Ntchol, 8, Wall. 59.
Neilson vs. Lagow, 12 How. 109.

In *Minnesota vs. Batchelder*, 1 Wall. 109, the state court had decided simply against its *own authority* to review a

a decision of the Secretary of the Interior. Federal questions were presented in the pleadings. But the state court had decided nothing; had simply refused to decide the federal questions, on the ground of its want of authority to interfere with a patent made to defendant by the commissioner of the land office. This patent was assailed by plaintiff on the ground of fraud. The writ of error was sustained, because as this court says: "By refusing to give any effect to the facts as set forth in the pleadings the court necessarily decided against them."

In *Maguire vs. Tyler*, 8th Wall 666, this court held, "where the respondant had plead the state statute of limitations to a confirmed land grant made in 1810, and to which no patent had issued until 1862, That the title had remained in the United States all the time. That respondant's plea of the statute of limitations was no answer to the federal claim set up in the pleading and that such a defense could not have been adjudged good by the state court without a direct denial of the foundation of plaintiffs' claim."

In *Johnson vs. Towsley*, 13 Wall 80, this court says: "The jurisdiction rests on two grounds. The plaintiff relied on his patent as conclusive of his right as an authority emanating from the United States which was decided against him, and he relied on certain acts of congress as making his title good and the decision was against the title set up, the case is fairly within one or both it the clauses of the act of 1867, and the rights of plaintiff in error claimed under the statute must be considered. See also

Moore vs. Robbins, 96 U. S. 531,
Rector vs. Ashley, 6 Wall 148,
Cousins vs. Blanc, 19 Howard 207,
Lytle vs. Arkansas, 22 Howard 193,
Garland vs. Wynn, 20 Howard 8.

Defendants in error make a motion to dismiss upon *twelve* grounds. All of these grounds are abandoned in the argument except *four*; and those *four* can easily be reduced to *one* viz:

1st. That there was no "Federal Question" specifically set up in the pleading of plaintiff or raised on the argument of the cause which has been denied or decided against directly by the

Supreme Court of Iowa," or which was necessarily involved in the decree rendered by said court. The record clearly discloses that the writ was sued out in the legal and regular mode and within the proper time. Plaintiff claims that the cases cited in defendants brief are wholly inapplicable to this case. That the case at bar contains several "Federal Questions" either one of which is of vital importance, and all of which entered directly into the decree of the state court, both in terms, and by necessary intendment. The plain provisions of *four* distinct statutes of the United States have been trampled under foot. Misconstrued, ignored and denied in this decree. The honor and integrity of the United States has been directly assailed in the honest administration of the public land grants of Congress by this decree. The proceeding is one in equity to set aside and cancel a void and illegal certification of a vast body of public land made through the *frauds* and illegalities of defendant, which is a cloud on plaintiffs rights, and obstructs plaintiff in securing a legal and proper patent title under the well known regulations of the land department, that when a certificate or patent has once been issued, that a second one will not be issued until the first has been cancelled. The question has often been before this court and the court takes judicial notice of these rules of the public land department in the administration of the public grants. The United States might well have been the plaintiff in this case, to vindicate her honesty, integrity and sovereignty in the just administration of the public land grants, and the untrammelled transmission of her land titles to the proper grantees. The United States has in many cases instituted exactly similar proceedings to annul patent titles illegally granted by *mistake* or misconstruction of law by the ministerial officers of the government, that proper and legal titles might be made to the rightful parties, and that the just execution of the laws be secured. Notable among these cases are those of the *United States vs. Hughes*, 4 Wall 235, and the *United States vs. Stone*, 2d Wall 525. And if the questions are of such vital federal importance that the United States could well be substituted as plaintiff in error in this case, why cannot her grantee seeking the same rights and ends be heard? What tribunal is more competent to be the final

arbiter in questions directly involving the conflict of claims, rights and titles under the laws of congress than this honorable court? To what court shall appeals be taken to obtain rights against gigantic frauds in the illegal transfer of vast bodies of public lands from one grant to another, where they were never granted and never intended to go; through collusion, fraud and corruption, mistakes and misconstructions, unless it be this honorable court?

Plaintiff specifically sets forth the swamp land grant of Sept. 28, 1850 by *title* and by repeating the substantial provisions of the statutes. It is plead as the foundation of plaintiff's right and as plaintiffs title and the supreme court of Iowa *denied the title* and decided against the title. Is it not clear and does it not follow as a logical sequence that the court in so doing denied and decided against the statute. The swamp land grant has been often held to have been a grant *in presenti*, see *Rail Road vs. Smith*, 9 *Wall.* 99 and numerous other cases.

2d.—The plaintiff further avers in their petition facts showing a perfect compliance with the swamp land law, and that under the instructions of the Secretary of the Interior, the lands in suit were lands set apart and reserved from sale as public lands and were so marked on the plat and tract books of the local and general land offices by the officers of the government, and that such acts of the officers vested in it the right to the lands and that it took possession of the lands and assumed control thereof. (record folio 2, 3 and 4.) This is clearly the assertion of a right arising under the exercise of an authority of the United States. But the right was denied by the state court. The decree, both in direct words and necessary intendment, is against the effectiveness of this action to confer any right on plaintiff.

3d. The plaintiff specifically sets forth another Act of Congress, the confirmatory grant of March 3d, 1857, (folio 4.) by title and substance, and pleads that act as a further title and confirmation of its right by Congress. It has been held by this court that a confirmation amounts to a title, and a confirmation by Act of Congress makes a good title. That such a confirma-

tion by law is a grant as fully and to all intents and purposes as if it contained in terms a grant *de novo*, see *Strother vs. Lucas*, 2 Pet. page 454 and *Choteau vs. Eckert* 2 Howard, 373, *Grignous Lessees, vs. Astor* 2 How. 320.

Were it not for the special provision of the Act of 3d of March 1857, in express terms directing that the swamp land heretofore reported under the Act of September, 1850, "shall be approved and patented to the several states in conformity with the provisions of the Act aforesaid," it might well be held that the Act of March 3d operated to transfer a complete and perfect title without a patent. But Congress seems to have, by the above provision, contemplated that a patent issue to convey the title. The proof clearly shows that no *patent* has ever issued. The the title to the land is therefore still in the United States and the grant is not yet executed. The state court in express terms decides that the title to the lands claimed by plaintiff has vested in the defendant because the commissioner certified them to the state for rail road purposes, under the Act of May 15, 1856, thus denying in the fullest and most complete sense the validity of the Act of March 3d, 1857, and deciding in the most positive form against plaintiffs right, claimed under said Act.

The language of the decree of the District Court affirmed by the Supreme Court is as follows, viz: "That the lands in contro-"versy to-wit (here describing the *locus in quo*) were duly certi-"fied to defendant as land inuring to it as alleged in the cross-"bill; that the defendant become thereby the *legal owner* of said "lands as alleged in the cross-bill" etc. Now as the Supreme Court affirmed this decree and entered no other decree, (Record folio 1038 1043). It seems too clear to admit of argument that the decision of the court was directly against and in conflict with the act of March 3d 1857. The pleading of defendant admits, that the lands had been selected as swamp *in fact* (folio 8) and seek to avoid the force of those acts by avering that the selecting officer was not duly appointed; that he made no proper examination of the lands &c., admitting the selections and reporting as alleged in the petition. Then it is clear that the act of March 3d 1857 confirmed the lands to the states and forever ended all controversy both

as to their character and ownership. And this court has held that said act was a finality as to their intended disposition by congress, and that respondent can set up no claim to these lands.

Rail Road Co. vs Fremont Co., 9 Wall 95.

By the very words of the swamp land grant of Sept. 28th, 1850 the titles to the lands granted were to pass by a patent, and this injunction to the land department is plainly renewed in the confirmatory grant of March 3d, 1854. No patent has ever been made to these lands, the title is of a necessary consequence in the United States. A certificate has been issued. It is clear that either the acts of Congress are void or the certificate is void. The Supreme court of Iowa says the certificate is valid; and in so doing they necessarily decree the statutes aforesaid void.

3d. It is further alleged in plaintiff's petition, in pursuance of the requirements of the code of practice of Iowa, requiring the plaintiff in such cases to set forth the grounds of defendants claims. "That the lands in suit were certified under defendant's "grant, &c. But that the lands in suit were not included in the "Rail Road grant, but were *reserved* therefrom and set apart as "included in the swamp grant, &c."

The record shows conclusively and there is no dispute that the lands in suit which are specifically described by sections and parts of section were marked "reserved from sale" in the plat and tract books of the land office, at Council Bluffs, on the 21st of October, 1854, (see record folio 16, 17, 18, and 19.) and after that date no entries were allowed of the lands in suit. The record also shows that the list of these selections were posted in the tract books of the general land office, May 31st, 1855, (folio 22.) The Iowa Railroad Land Grant of Congress, of May 15, 1856, requires, by its first section, that a line of route of defendant's road should be "definitely fixed," to determine their rights, and the third provision of said section is as follows, to-wit:

"*And Provided Further*, That any and all lands hereto- "fore reserved to the United States, by any act of Congress, or "in any other manner by competent authority, for the purpose "of aiding in any object of internal improvement, *or for* any

"other purpose whatsoever, be and the same are hereby reserved "from the operation of this Act."

The record shows on (folio 25 and 26, pages 19, 20 and 21,) that the defendants line of definite location was not adopted till the 24th of March, 1857. And it has been adjudicated by this court in a similar case. *Rail Road Co. vs Fremont Co*, 9 Wall 89, that the defendants line of road was not adopted till said date. Now is there any concievable ground upon which the defendants could base an honest claim that these reserved lands inured to it under this grant of May 15th 1856? The very condition of the grant is that "reserved lands are reserved from the operation of the Act." Congress did not grant them to defendant, whatever became of the lands. Where did the commissioner, acting under the authority of the United States get authority to certify to defendants lands not granted to them. And how can the state court hold that such certificate is valid to vest the "legal ownership in defendant of the land, and not ignore and invalidate this reservation made for plaintiff's protection in the grant under which defendants claim, and how can it be claimed with any show of truth that the confirmatory grant of 3d of March, is not in point of precedence a prior disposition of the lands. Defendant's grant was a *float* until the line of their road was "definitely fixed," and that fact was determined prior to the definite location, (see record folio 25,) by the decision of the Secretary of the Interior, while defendant's grant was yet a float the Act of 3d of March was passed. If supremacy is given to this Act, how can defendant's certificate be valid. The state court's decision invalidates most clearly all these statutes.

4th. Still another statute of Congress, applicable to the case was decided against, sec. 2449, Revised Statutes, chapter , Act of 1854. This statute authorizes the commissioner of the general land office to transfer the government title to the grantees of Congress by a "certified list, when no other way is fixed in the grant, and the list of lands, duly certified, is regarded as conveying the fee simple title to all lands of the character contemplated by the Acts of Congress, and which are intended to be granted," and then to protect all parties, contains

the following clause: "But where lands embraced in such lists "are not of the character embraced by such Acts of Congress, "and are not intended to be granted thereby, the lists so far as "these lands are concerned shall be perfectly null and void and "*no* right, title, claim or interest shall be conveyed thereby." The lands in suit lie within the six and fifteen mile limits of the defendant's line of road. The commissioner has certified the list including them for Rail Road purposes. Whether the lands in suit contained in the certified list are of the character contemplated by the Act of Congress and were intended to be conveyed to the railroad by the Railroad grant, is a federal question most clearly, and as the plaintiff alleges that the certified list was made by fraud and through collusion; and that certified list is the basis of the decree of the state court, this court clearly has jurisdiction to review the question. It is claimed the state courts decree is a simple estoppel in equity, according to the principles of the common law, and therefore there is no federal question. But the record does not sustain the argument. The amended cross bill of defendant, pleading the estoppel, states as the basis of the claimed estoppel that at defendant's request the claim of plaintiff had been rejected by the commissioner and the lands certified to defendant; and the decree of the court is bottomed on the existence of this certified list, and the ownership of the lands under it. The 3d count of defendant's cross bill setting up an estoppel and the original plea on that subject avers: "That on "the 25th of October, 1861, the rights of plaintiff under the "swamp land claim were submitted to the commissioner, that "defendant appeared before the commissioner and resisted the "claims of plaintiff and asserted his rights thereto under the "railroad grant, and that after a full examination of plaintiff's "claims, rejected the same as fraudulent and unfounded, and on said date certified and conveyed "them to the state for railroad purposes." The "cross-bill then alleges that the defendant thereafter claimed the "lands and plaintiff recognized the defendant's claim by taxing "the lands to defendant." The plaintiff for reply avers that the certificate was issued at the *exparte* application of the defendant without plaintiff's knowledge or presence, and through fraud and collusion. The decree of the court plainly states that the court held that the certified list conveyed the title to defendant, and that "defendant became thereby the legal owner." Clearly

the question here is a federal one. The plaintiff claiming that the former action of the commissioner in approving the selections and taking them out of market was effectual under the Acts of Congress, to vest the legal rights in plaintiff, and the defendant claiming that the subsequent acts of the commissioner in rejecting the selections and certifying the lands under the railroad grant was effectual to defeat plaintiff's claim and vest title in defendant. If Congress *intended* to grant the lands in suit to defendant, their title is good; but if Congress did not intend to so grant them then defendant *has no claim* on them, and never had. The mere payment of a public rate or tax on lands, where the party paying has no title, claim or interest in them whatever, could not be the ground of an estoppel. It is because defendants had a claim on them that created the estoppel in the judgment of the state court. The state court in both its opinions, by Cole and Miller, Justices, assume that a legal and valid claim was held on the land by defendant. In so doing the aforesaid section 2449 is clearly misconstrued and annulled; because if it appears that Congress did not *intend* to grant the lands to *defendant*, then the certified list was *null* and void and conveyed *no* title or claim whatever.

In the first opinion, Cole, justice, says: (folio 1048.) "The "defendant averred and proved that after the controversy about "these lands before the Secretary of the Interior, who *certified* "the lands to the defendants immediately thereafter, and in Oct. "1861 the plaintiff had *recognized the defendant as owner* "*thereof*, and had assessed and collected taxes thereon of de-"fendant, &c." That defendant had sold some of the lands to "various persons, &c. It may not admit of much doubt that "plaintiff is now estopped, &c."

Judge Miller, in his opinion, (folio 1053 and 1054,) says: "The lands in controversy had been claimed by defendant under "the land grant of May 15th, 1856. The county claimed the "same lands as swamp. On the 25th of October, 1861 the claim "of the county was rejected, and the lands certified by the proper "department at Washington to defendant, as belonging to de-"fendant. Whether this decision was right or not we are not "called on now to decide, but from that time, 1861, these lands "were charged with taxes for almost every year as the property "of defendant, &c." Furthermore he continues, "Thus the

county with full knowledge that the defendant *claimed* the lands in dispute, &c." * * * The county having thus recognized the plaintiff as *the owner* of the lands in dispute, &c." Now it is too manifest for dispute that the bottom fact of defendants claim is this certified list, their claim of title under a state statute, and while the court does not say in their opinion that they decide it to be valid, yet they treat as valid and give it a standing in court as valid and speak of and treat defendant as *prima facie* owners because of it and by so doing make it the foundation of the estoppel. The estoppel is no independent and sufficient defense of itself, it has no existence aside from the certified list. It is not claimed by the court that the payment of taxes creates an estoppel alone, but only because they were paid under a claim of ownership. But the decree goes much farther than the opinion and declares that defendants "were the owners." The plaintiff relies on section 2449, and the state court could not reach a decree without necessarily construing that statute for one party or the other either in terms or by necessary intendment. Independent of the certified list there is no defense that is controlling as a complete answer to plaintiff's claim.

Plaintiff maintains the jurisdiction of this court upon the following grounds:

1st. That plaintiffs' right and title as stated in its petition being based on the swamp land grant of Sept. 28th, 1850, and the decision of the State court being against its right and title gives this court its jurisdiction; and in deciding against plaintiffs' right and title the state court necessarily decided that the said statute was not a grant *in presenti*.

2d. That plaintiffs' right and title as stated in its petition was based on the authority exercised by the Secretary of the Interior in approving the swamp land selections and reserving the lands in suit from sale in 1854, and the state court decided against the authority so exercised.

3d. The plaintiffs' right and title as stated in its petition was based upon and protected by the *third proviso* of the first section of the railroad grant of May 15th, 1856, and the decision

of the state court was against the rights and immunity so claimed under said *third proviso*; and in deciding that the certified list of reserved lands vested the defendant with the ownership of said lands, the court necessarily decided against the validity of said *third proviso*.

4th. The plaintiffs' right and title as set up in its petition was based on the confirmatory act of 3rd of March, 1857, confirming the lands in suit to plaintiff, and the decision of the state court was against the right and title of the plaintiff under said act; the state court thereby necessarily deciding that the said statute was ineffectual as to plaintiffs' right and invalid.

5th. The immunity claimed by plaintiff to have the certified list of reserved lands to defendant cancelled as a cloud upon the plaintiffs' title under section 2449 of the Revised Statutes, was denied and decided against.

6th. The plaintiff set up its title and right under the swamp land act of September 28, 1850, and certain proceedings before the Secretary of the Interior and the commissioner of the general land office, setting apart the lands in suit as reserved, the confirmatory grant of 3d of March, 1857, and the reservations in the 3d proviso of the railroad grant of May 15, 1856. Against these acts the defendant set up that the lands inured to it under the railload grant of May 15, 1856. The state court decided expressly that the lands inured to defendent under the last named act, thus deciding against the validity of the first named acts and against the right and title of plaintiff so specially set up under the afore-named acts.

7th. And the court at the same time decided in favor of the validity of the state statute of July 14, 1856, to grant and convey the lands so reserved by Act of Congress to this defendant, and thereby this court has jurisdiction under the 2d clause of the Judiciary Act. Rev. S. 709.

8th. Defendant specially set up its title under a state statute, the Act of the Iowa Legislature of July 14th, 1856, and plaintiff denied this right, because it was in conflict with the laws of the United States, (folio 6-68,) and the decision of the state court was in favor of the state statute.

9th. That the State Revenue laws of the State of Iowa taxing the lands in suit, while the title was yet in the United States, and such title was withheld by the Secretary of the Interior, and the authority of the local taxing officers acting under such laws were directly drawn in question as being contrary to the laws of the United States granting the lands in suit, and the decision of the State court was in favor of the validity of the State statute and the acts of the State officers. [Folio 70, paragraph 13, and folio 72.]

BRIEF OF PLAINTIFF IN ERROR ON THE MERITS OF THE CASE.

THE SWAMP LANDS IN SUIT WERE DULY SELECTED, REPORTED AND RESERVED FROM SALE ON THE TRACT BOOKS, EIGHTEEN MONTHS PRIOR TO DEFENDANTS' GRANT.

The evidence is conclusive and there is no dispute nor any contradictory evidence but that these lands in this suit were selected as swamp, and reported by competent authority the 29th of May, 1854. See testimony of S. Baker, A. J. Baker and Holbrook, (folio 13, 14, and 15) and Trippett's certificate, (folio 19).

By the Secretary of State they were reported to the Surveyor General, July 6th, 1854. (folio 20).

They were compared with the field notes and certified as swamp by the Surveyor General, September 20th, 1854, (folio 20) and forwarded to the general land office, September 21st, 1854, (folio 21) and received by the commissioner, September 28th, 1854, (folio 21) and posted on the tract books of the general land office, at Washington, May 31st, 1855, (folio 22).

On the 30th of September, 1854, the commissioner directed the register and receiver, at Council Bluffs, to mark these identical lands as reserved from sale, on the books of the local office, (folio 23).

L. W. Babbitt, Register of the Land Office at Council Bluffs, testifies (folio 19):

"I proceeded, between the 21st day of October and 1st day of November, 1854, to mark upon the plats and books of the office

the lists of swamp lands received from the Surveyor General's office as reserved from sale, of which the following lists of lands in Adams county, State of Iowa, are a part, to-wit: (Here follows a description of the lands in controversy.)

"The marking was done by taking a pencil and drawing a line around the tract, and the word "swamp" was written across the face of the tract, also in pencil. There were no entries allowed during my term of office after the 21st of October, 1854. The lands were subject to private entry prior to and up to that date, and were then withdrawn, as above stated." I continued in that office until October 20th, 1856."

This was the condition then of the lands in suit on the 15th of May, 1856, at the time Congress passed the bill through and under which defendants claim all the interest they ever possessed. These lands, by the regular constituted authorities, had been "*reserved from sale or private entry*" for eighteen months then past and so marked on the books of the Local and General Office, in technical compliance with the regulation of the Secretary of the Interior and Land Department at Washington. Now let us look at the railroad land grant and see how Congress disposed of these "*reserved*" lands, and see what right defendant could acquire thereunder to them. The record, as we insist, discloses a purpose on the part of defendants to filch these lands from the county by any means, "fair or foul," and foul rather than not at all.

SWAMP LANDS RESERVED FROM RAILROAD GRANT.

The bill is found in Lester's Land Laws No. 288. The first section grants a general description of the public domain of Iowa to build certain railroads, at the end of which section occurs three *provisions*, the *third* of which reads thus:

"*And provided further*, that any and all lands *heretofore reserved* by any Act of Congress, or in *any* other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for *any other* purpose whatsoever, be, and the same *are hereby reserved* from the operation of this act; except so far as it may be found necessary to locate the routes of said railroads through said reserved lands, in which case the *right of way* only shall be granted, subject to the approval of the President of the United States."

It cannot be claimed but that the Secretary of Interior was a competent authority to mark the swamp lands *reserved*. The swamp land grant expressly appointed him as the officer to make out the list of swamp lands.

See Lester's Land Laws, Vol. 1, No. 182, Sec. 2.
See Lester's Land Laws, No. 574, et Seq.

It is not claimed that defendants were ever authorized by the President to construct their line of road over any of these lands, nor that defendants found it necessary to do so, hence there is no right of way claim, and as for title, it is quite plain defendants were excluded from title by the act itself. Defendants could as well and clearly claim the *sixteenth* section of school lands, the *five hundred thousand* acre grant, the University or Des Moines River Improvement land grant, as to claim these swamp lands—they were all equally *reserved* from the operation of the railroad grant.

The effect of this reservation — the condition of these lands, the rights of the railroad company, the paramount title of the county, and, indeed, every question or point material to our right, is fully discussed and settled in the following cases—all in perfect accord with our claim: *Fremont Co.* vs. *B. & M. R. R.*, 22d Iowa, 91; *Page Co.* vs. *B. & M. R. R.*, 40 Iowa, 520; *Montgomery Co.* vs. *B. & M. R. R.*, 38 Iowa, 208; *Fremont Co.* vs. *B. & M. R. R. Co.*, 9th Wallace, 90.

And when it is remarked that these cases all relate to the very Congressional grants under which these parties also claim—that the facts as to selections and reservations by the counties—as to the action of the Interior department,—as to the location of defendant's line—in a word, that our case is in every essential particular "on all fours" with those cited we say when this is remembered, the pertinency of the claims will be at once apparent and their conclusions at once admitted.

And see R. R. Co. vs. Smith, 9 Wall. 95.

ACT OF MARCH 3, 1857.

But not only do the acts and decisions referred to establish and confirm our right, but by the Act of March 3, 1857—(An

Act to confirm to the several states the swamp and overflowed lands selected, &c., *Lester's Land Laws*, page 285), the selection made by us was confirmed, and directed to be patented and approved to Iowa and all the states in conformity with the provisions of the original granting act. This act was passed before the defendant had located its road, until which time its grant was but "a float," and as it had not perfected its grant so as by priority to become entitled to any of the lands included in the swamp land selections in the office of the land department, it follows necessarily, by the very language of the confirmatory statute, as well as under the authorities above cited, that it is without shadow of claim to these lands under the grant of May 15, 1856.

And see opinions of Attorney General, *Lester's Land Laws*, page 512; Secretary of Interior, pp. 558, 559, and 565, 567, 570; Atty. Genl. 564–5; Commissioner to Secy. 565, 567.

Also *American Emigrant Co. vs. C. R. I. & P. Co.* 47 Iowa, 515.

The defendant's line was not *definitely* located and adopted until March 24, 1857. This the record shows and has more than once been decided by the courts of Iowa, as also by this court. (See the cases above cited, also Fol. 25.)

The facts are that defendant had nothing more than the merest paper location of its road prior to March 24th, 1857. This paper location was made July 25, 1856, which was before the act of the Iowa Legislature accepting the grant, took affect, and before the grant was in fact accepted by the company; the acceptance was September 3, 1856. Such location was therefore a void act. The only valid location and adoption was March 24—filed with the Secretary of State March 29, with the Interior Department April 6, 1857, and upon this line thus located and adopted, the road was built and the Commissioner of the General Land office certified the lands. So then the affect of our selections, and the reservation, recognized and provided for by the act of 1856, being left entirely out of view, it would still follow that the confirmatory act of March 3, 1857, would defeat any claim of defendant to these lands.

SWAMP OR DRY NO LONGER MATERIAL.

1. These cases, statutes and decisions settle, too, that it matters not whether the lands selected prior to the confirmatory act, were "swamp" or "dry," for their swampy character was no longer a material inquiry, since Congress, under its power to dispose of the public domain, had quieted and confirmed the lands as selected, whatever their character, to the States.

2. But if the inquiry could be made, there can be no doubt, unnder the testimony, that these lands were of the character contemplated by the grant of 1850. That the proper officer selected them, determined that they were "swamp or overflowed; that they were found to be so and so reported under oath and by proper certification; that they were accepted as such and had this character impressed upon them, as well as that they were so in fact, is well established. Against this claim—and the burden is on defendant to overcome the at least *prima facie* (we insist *conclusive*) presumption, arising from the surveys, selection and acceptance—against this there is not a scintilla of evidence.

For proof see folios 19 22.

CERTIFICATE TO RAILROAD VOID.

It is claimed perhaps that since the Commissioner of the General Land Office certified these lands to the railroad company, therefore that title is permanent and cannot be inquired into by the courts.

We say that certificate was void.

1. The mandate of the statute (act of March 3, 1857,) was that the selection made should be patented to the several States as soon as may be practicable after the passage of this law. He had nothing to determine, but his duty was plain and imperative, since the title was confirmed, to approve and patent.

2. Thus, too, by the section (Rev. Statutes ss, 2449,) under which the certificate was made, it is expressly declared:

"But where lands embraced in such lists (the list certified "by the Commissioner) are not of the character embraced by "such acts of Congress and *are not intended to be granted there-* "*by* the lists *so far as these lands are concerned, shall be perfect*

"ly null and void; and no right, title, claim or interest shall be "conveyed thereby."

Most clearly it was never intended to grant to the railroad company lands before reserved. Equally clear is the proposition that it was not intended that the railroad should take lands, the title to which had been confirmed to the state under the swamp land act. And this being so, it follows necessarily that the boasted certificate is perfectly null and void, and no right, title, claim or interest was "conveyed thereby."

3. In any event such certificate was not conclusive. For by all the authorities herein cited, as well as others, plaintiff may test the correctness of such certificate and defendants right to the lands in the courts. The act of the executive officers, equally with those of the legislative department or an individual in violation of vested rights is always the subject of judicial cognizance.

Bagnor vs. Broderick, 13 Pet. 451.
Wilcox vs Jackson 13 ib. 498.
Satterlee vs Matherson 2 ib 380.
Arnold vs. Grimes 2 Iowa 7-19.

4. The state by its own action, (and the defendant claims through the state,) repudiated all right to these lands for railroad purposes.

See Joint Resolution No. 17, of Iowa General Assembly, 1862, page 245, as follows:

"Be it Resolved by the General Assembly of the State of Iowa, That whereas, the commissioner of the general land office of the United States has rejected certain lists of lands, selected as swamp and overflowed lands within this State, by the agents of the state under the act of Congress, approved September 28, 1850, under the supposition that the State of Iowa claims said lands for Rail Road purposes, under the Act of May 15th, 1856, and, whereas, many of the lands so rejected have been sold to bona fide purchasers by authority of the General Assembly of this State, and are now in actual possession and cultivation by citizens of this State:

Therefore Resolved, That the State of Iowa hereby disclaims any purpose or intention to claim the lands so selected as swamp and overflowed lands, under any other grant, or for any other pur-

pose, than is expressed in the Act of Congress, approved September 28th, 1850.

Resolved, That any selection of any of the swamp and overflowed lands of this State for railroad purposes, or the selection for railroad purposes of the lands selected as swamp and overflowed lands, by the agents of this State, prior to March 3d, 1857, has beeen without authority or consent of the State of Iowa, and any and all such supposed acts, upon the part of the State of Iowa, are hereby expressly disclaimed.

Resolved, That the Secretary of the State be requested to furnish a copy of these resolutions, duly attested under the seal of the State, to the Commissioner of the General Land Office, and the Secretary of the Interior of the United States; and the Governor of this State be authorized to take such steps as shall secure to this State the swamp and overflowed lands, under the Acts of Congress, approved Sept. 28th, 1850; March 3d, 1857; and March 12th, 1860.

Approved April 7th, 1862."

By this it will be seen that the state disclaims any intention of claiming these lands under any other than the Act of 1850 and that the selection of such lands by its agents for railroad purposes, was without its consent or authority, and all such acts were expressly disclaimed. So that the state standing indifferent to these two grants, for the one it had turned over to the county and the other to the railroad company, said and directed that the swamp land selections should remain intact, and repudiated the so called acts of agents self appointed and self acting, which could despoil the one grant to the aggrandizement of the other. The railroad had got all it expected, all it was entitled to, for the swamp land reservation was known to the government, the state, railroad officials, and all persons, when the act of 1856 was framed, and hence the state knew that this attempt by surreptitious and underhanded means, to filch these lands by the railroad company, was contrary to the spirit of both grants, contrary to the purpose and intent of the law-making power; contrary to the original expectation of the company; and knowing this declared what it intended and the purpose to which these lands should be devoted, to-wit, the original purpose of their improvement and reclaimation.

5. We affirm that a bolder or more transparent attempt to obtain lands without right was never known than the one here made under claim of the boasted certificate. The action of the department was clandestine, *exparte*, fraudulent, without notice and void from its inception to its ending.

The claim of the state under the swamp land act, was rejected, according to defendant's theory, on the 25th of October, 1861. And yet this same commissioner on the 8th of Feb. 1862 in answer to a letter of Senator Harlan, written the day before, at the instance of Adams county, referring to what he styles conflicting grants, says: "These are to be adjusted by the evidence of the field notes of the survey, as denoted by instructions from the Secretary of the Interior, of the 8th Feb. 1860, *and to this end we propose at an early date to make the requisite examination. When* this examination shall be completed, the lands *will be assigned according as their character, whether swamp or dry, shall be ascertained.*" (folio 93 and 94).

And thus it will be seen that almost four months, after this alleged rejecton he makes known in the most formal and authoritative manner to one who had a right to seek for information, that at an early date he would make examination and assign the lands to the swamp or railroad grant, as their character should be ascertained. And yet if defendant is right this determination and arrangement had been made long before, and the rights of the State under the act of 1850, conclusively settled.

Was there ever a bolder fraud or wrong perpetrated by any so called decision?

6. But this was all done at the instance of the railroad company through its agent, one Steiger, without the knowledge of or notice to the county, the state, or any of the officers of either. This agent furnished the lists, procured the testimony—secretly and clandestinely—procured the order, rushing everything through with "break-neck speed," but after getting it in October, 1861, kept everything quiet until March 10, 1862, and then the governor was notified. At once the governor attempted to be heard and to have the thing righted, but the appeal was without avail, for before the Governor's appeal could reach

Washington by ordinary course of mail the commissioner had hastily issued the certificate March 22d 1862.

For the circumstances attending this disgraceful part played by Steiger, the want of notice, its *exparte* character, its absolute disregard of the rights of the state and the county, and the absence of everything like a fair or prudential hearing, etc. See folio 91, 94, 114, 115.

(Folio 90-92,) Steiger made the lists, all the explanations, had "examined all the evidence with care!" wanted action without delay, and was kind enough (folio 90) to advise the department that Gen'l Dix, the president of the company, was extremely anxious that the lands in question might be made available to the company at the earliest day possible. (Deposition of Skinner, folio 114-117; Steigers' letter, 535-39; deposition of Steiger, 503-525.) He did not think there could be any *contest*, for there was but *one party*, the state, and as he represented the railroad, he of course represented the state, and that was enough!!—(519 Deposition of Curtis, 526-7.) The data was prepared by *Steiger, agent of the road!*

ESTOPPEL.

The defendant having by snap judgment obtained a decision, which it vainly imagines settles its right to these lands, follows up the same line of tactics under its *estoppel defence*. It got the decision by an *exparte* hearing—indeed without any hearing, and now claims an estoppel by artifice, by its own act in getting a subordinate county officer, without the knowledge of the county or its governing board, to mark "taxes remitted," that thereby it might claim that the county had recognized the title of defendant, and surrendered its own. This is in substance the basis for the claimed estoppel.

1. The defendants title from the state is found only in the legislative grant or the legislative act. This only granted so much as was granted by Congress, and as none of the swamp lands were granted by the latter, but on the contrary expressly *reserved*, afterward, as we have seen, *confirmed*, and the certificate to the railroad company repudiated and disclaimed by the

state; it follows that, so far as the state is concerned, it never undertook, and indeed could not undertake to give title to these lands to defendant. In addition to this it is expressly provided by the Iowa statute, code of 1873 ss. 93, under and by virtue of which any certificate could only have been issued thus:

"Where lands embraced in such lists are not of the character embraced by such acts of Congress, or the acts of the General Assembly of the state, and are not intended to be granted thereby, the lists so far as these lands are concerned shall be perfectly null and void, and of no force or effect whatever; provided that no lands now in suit shall be included in such lists until such suits are determined and such lands adjudged to be the property of the company; provided further that the register shall not include in any of the lists so certified to the state which have been adjudicated to belong to any other grant or adjudicated to belong to any county or individual under the swamp land grant, or by homestead or pre-emption settlement. Nor shall said certificate so issued confer any right or title against any person or company having any vested right either legal or equitable to any of the lands so certified."

[This act was passed in 1872, our action was commenced in 1869, was submitted in Nov. 1871, and decided in our favor in the same month 1872.]

So that nothing could be claimed under any alleged certificate or title from the state, if defendant had any, but it has not and never had.

2. Plaintiff never by acquiesence, nor word or actions, recognized defendants' claims or led it to suppose that the county abandoned its claim to these lands. On the contrary it was diligent and active in making known its claims and that it disputed any and all titles of the company.

[*a.*] The county never ordered these lands to be taxed and never intended they should be taxed.

[*b.*] In Sept. 1862, the county made a contract with the American Emigrant Company providing for certain improvements and the sale and release of the swamp lands, thereby asserting its right and title thereto, (folio 38).

[*c.*] April, 1869, it made contract with F. M. Davis for the protection of these lands, looking to the bringing of suits and all acts necessary to quiet title, whether againt the Emigrant Com-

pany, Railroad or any other person, (folio 46, 101-3.)

[*d.*] In April 1870 Mr. Davis as attorney for the county, entered notice of its rights on "Encumbrance Book" against the Emigrant and Railroad Company, and all other persons—before this in April 1869 had begun a suit to quiet the county title against said company—instituted proceedings against the Emigrant Company, (the board having rescinded the contract on April 22, 1869.) The railroad company's agent, D. N. Smith, admits in his testimony, (folio 130, Cross Int. 35,) that he knew that such a suit was pending when the compromise was made.

[*e.*] The railroad company had lands in the county liable to taxation other than these in suit. This no one controverts. Hence it is that the action of the county board in *June*, 1861, for the taxing of railroad lands is explained, and any effort to show that the lands now in dispute were included or referred to is abundantly answered by the suggestion that at that time the county was indisputably making claim to the lands, the decision rejecting its claim was not made by the commissioner until in October, or four months and more after, (folio 679, Ev. of Barnett.)

[*f.*] The county and state were diligent in asking to be heard at Washington, so soon as it was known that the decision had been made, thereby showing most clearly that there was no intention to abandon these lands. (Miller 97, Answer of Commissioner 98, letter of Davis, April 3, 1862, to Commissioner, with list of lands claimed, 564-68.)

[*g.*] These lands were never taxed *as railroad lands*, certainly never by any competent authority.

[*h.*] The agreement with Smith, agent of the railroad company, of June, 1869, was not intended to embrace these lands—the supervisors expressly intended to exclude them or supposed they were excluded—they were not in fact included, no list was presented by Smith; the railroad company had a large body of land to which this agreement or compromise did and would apply, (folio 350-340).

[*i.*] The action of the legislature of the state, in its resolution of 1862, above referred to, in its desire to protect the swamp lands against unjust claims (Act of 1872 Code ss. 93 above) and

in many other ways, as well as the orders and acts of the board of supervisors, rebut any presumption of abandonment and answer any claim of estoppel.

[k.] It will not be forgotten that during the years of alleged taxation and claimed inattention to these lands by the county, the contract with the Emigrant Company was in force, or at least had not been rescinded, and then there is full explanation of what might otherwise be deemed a failure to assert title. So soon as that was out of the way and indeed almost simultaneously with the commencement of proceedings to get rid of that contract, proceedings was commenced to quiet the title against the railroad company.

[l.] The effort to have the taxation figure as an estoppel is a manifest and plain fraud, concocted in the same spirit which procured the exparte decision at Washington, defendant being perfectly conscious that under all the decisions of the court and in law the lands were lost to it, unless resort was had to some other trick or device to defraud the county.

3. As to the estoppel, we state this proposition or make this inquiry:

A land grant is claimed by two different corporations, one a county, pending a contest before the departments, at home, in the county, in the courts and before the state tribunal, before any patents have been issued, and while the county is ostensibly bound by a contract to convey convey the lands to a third party, and is by that contract bound to keep the lands untaxed, we say in this condition of things, if it seems that some or even all the lands so included shall by the action of the local assessor, be placed on the tax list, under the name of "unknown owner"—a fact not brought to the attention of the governing board of the county (supervisors), will the county be thereby estopped from setting up its title against the other corporation? We say to hold the county estopped under such circumstances is in the face of all law, all equity, all common sense, all right, all justice, and that there is not a case in Iowa or in any reputable court in conflict with our claim.

[a.] It is utterly and palpably false that the supervisors ever ordered those lands taxed.

[*b.*] It is equally so that they or any officer of the county ever knowingly received any taxes from the defendants on these lands.

[*c.*] The railroad company knew of the former action of the county, which had never been abandoned, and it could not by mere silence have been misled or deceived to its prejudice by any action of the county.

[*d.*] The district court of Adams county by the original decree of November, 1872, (folio 63) found that the railroad company have paid the sum of $93.36 for the year 1869, which was paid after this suit was brought, as taxes on these lands. And that of the $10,000 paid to compromise the claim of our $22,610 made by the county for taxes on railroad lands, for years 1861 to 1868, not a single dollar applied to the lands in dispute. And we here challenge counsel to show that this finding is other than in strict accord with the record and the evidence.

[*e.*] In all the cases cited and relied upon to show an estoppel against a county growing out of taxation, it will be found that the taxes were levied knowingly, the facts were well understood, the claim of the railroad was not then questioned, its officers were reasonably and fairly misled by the action of the county, in some instances they had sold the lands, relying upon the admission of the county implied by the taxation, and in every instance the circumstances were so utterly variant from that at bar they cannot in logic or reason be claimed as pertinent in this.

PROPOSITIONS OF LAW.

A PUBLIC CORPORATION IS NOT ESTOPPED TO CLAIM TITLE BY TAXATION.

1. "The swamp lands held by a county for a public use, are "not taxable. Revision of Iowa 1860, sec. 711.

2. "A municipal corporation owning lands, is *not estopped* "to claim title to it because its officers without authority have as- "sessed the same to a private person, returned the same as delin- "quent, and subsequently sold it at tax sale. The reason is, that "all these acts of its officers are unauthorized and void, and a pur- "chaser at a tax sale is bound to take notice of the extent of their "powers."

McFarland vs. Kerr, 10 Bosw., N. Y., 249, (exactly in point.)
Rossire vs. Boston, 4th Allen, 57.
Dillon on Municipal Corporations, p. 420, middle of notes.
St. Louis vs. Gorman, 29th Mo., 593.
Also Shaw vs. Spencer, 100 Mass., 382.
Henepin County vs. Robinson, 16 Minnesota, bot. 385.
Lorillard vs. Monroe, 1st Kernan, 92.
Ellsworth vs. Grand Rapids, 27 Mich., 250.
Buena Vista County vs. I. F & S. C. R. R. Co., 46 Ia. 226.
Parish vs. Coon, 40 Cal. 33.
McCarter vs. Orphan Asylum, 9th Cowan, 437.
Chambers vs. St. Louis, 29 Mo., 543.

"In Henshaw vs. Bissell 18th, Wall. bot. 271. It is held "that " To the enforcement of an estoppel such as will prevent "a party from asserting his legal right to property there must "generally be some degree of turpitude in his conduct such as has "misled others to their injury. Conduct or declarations founded "upon ignorance of ones rights, have no such ingredient and sel- "dom work any such result."

3. "If estoppel is claimed on the ground of *silence*, then it "must be proved that the silence was *willful, deceptive and "fraudulent*."

Henshaw vs. Bissell, 18 Wall., 270–271.
Swerzy vs. Collins, 40 Iowa 540.
Watson vs. McLaren, 19 Wend., 557.
Storrs vs. Barker, 6th Johnson, 166.
Wendall vs Van Ransalaer, 1st John., 354.
Bigelow on Estoppel, p. 561.

4. To constitute an estoppel it must be shown that defendant was: (1,) Ignorant of the material facts. (2) That the Board of Supervisors officially knew all the facts, and represented material facts outside the agreement. (3) That defendant *relied* thereon, (4) and were deceived by such representations.

Vide Joint Resolution No. 17, Acts of 1862.
Revision of Iowa, Sect 711-988-989.
Jones vs. Cole, 26th Alabama, 612.
Clarke vs. Sisson, 22 New York, 212.
Bigelow on Estoppel, p. 480-560, et seq.
Case vs. Albee, 28 Iowa, 280.
Maloney vs. Horan 12 Abb., N. Y., Pr. N. S., 289.

And the defendants must have been *induced* to make payment by such representation.

Shaw vs. Spencer, 100 Mass., 382.

5. The fraudulent representations must be of material facts.

1st Story Eq., Juris, section 191, last part.
Nevill vs. Wilkerson, 1 Broch, 546.
Turner vs. Harvey, Jacob Rep. 178.
Small vs. Attwood, 1st Young, 407.
Hough vs. Richardson, 3d Story, 659.
2d Kent's Com., marg. p. 484.

6. The sale of county land not taxable for taxes would convey no title but be void

Sully vs. Poorbaugh, 45 Iowa, 453.
Gibson vs. Howe, 37 Iowa, 237.
Revision, section 784.

7. The method of alienating swamp lands in place is clearly pointed out by statute, and the Board of Supervisors cannot alienate real estate belonging to a county by their neglect or carelessness, nor in any manner except as provided by statute, *vide* Revision, section 987-988, and where the swamp lands are to be disposed of to a railroad the statute expressly provides the method, to be by submitting the sale to a vote of the people and if a majority vote against it the sale to be void, and it cannot be for a less sum than one dollar per acre, Section 2, Chapter 67, Acts of 1864.

Middletown Savings Bank vs. Dubuque, 15 Iowa 395.
Merritt vs. Burbank, 23 Maine 538.
Clarke vs. Pratt, 47 Maine 55.
Oscard vs. Samony, 1st Peerman, Ill. 504.
Dillon on Mun. Corp., sections 447, 373 and 433.
McCracken vs. San Francisco, 15 Cal. 591.
Groger vs. San Francisco, 18 Cal. 590.
Pimental vs. Ib., 21 Cal. 351.
Herzo vs. Ib., 33 Cal. 134.
Valley Railroad vs. Homestead Co., 17 Wallace 153-166.

8. Defendant must prove that the county assented to the transfer of the *identical lands* to defendant.

Jones vs. Cole, 26 Ala., 612.
Ware vs. Cole, 24 Ala., 446.
McDonald vs. Graham, 3d Dana, 73.

WE WILL NOW DISCUSS THE EVIDENCE UPON SEVERAL POINTS MORE IN DETAIL.

And first:

NO TAXES WERE PAID ON THE LANDS IN SUIT BY DEFENDANT. THE SWAMP LANDS WERE EXCLUDED FROM THE ESTIMATE.

The evidence is conclusive that no part of the $10,000. compromise money was for taxes on any of the lands in suit. The compromise was made between one D. N. Smith, an agent of the railroad company, who was the only party present on behalf of the defendant, and the board of supervisors, consisting of nine members and Bixby, the clerk, were all the persons present (folio 54 and 55). There is no claim that any taxes were ever paid except in that compromise. The written article of compromise is set out twice in full (record 54-55 and 670-671). It specifically refers to "a large amount of railroad land in Adams county held by defendant by a conditional grant from the state of Iowa." Lands not in this grant were not included in the tax compromise. The compromise was general and no specific lands were named or referred to, nor was any list then or afterward made. At the date of the compromise, plaintiff claimed to own the swamp lands because they had been taken out of market as "reserved," before the date of the railroad grant, and because they had been confirmed by the Act of 3d of March 1857.

The county had previously contracted the lands to the American Emigrant Company, and being dissatisfied with the performance of the contract had brought a suit to set it aside, in which suit these lands were specifically described. The defendants agents knew this suit was then pending. The defendant had obtained the certified list containing these lands, in 1862 and had claimed them. But the same certified lists contained the swamp lands of Mills county. And in a certain suit between Mills county and defendant, decided in April, 1865, the district court of Iowa had decreed the certificate null and void, after which time the defendant made no open claim to said lands, and the supreme court of Iowa had two years before, in 1867, affirmed said decision, see *Fremont and Mills Co's. vs. Railroad* 22d Iowa, 92. During the compromise proceedings which run through the years 1868 to June 1869, over a year, the defendant made no open

claim to the swamp lands. The county had allowed pre-emptions under the state laws to portions of these lands, and these pre-emptors had placed more or less of them on the tax books in their own names, and the evidence shows that some of the tracts were on the tax list as "unknown," up to 1867. In 1867 the clerk of the supervisors, whose duty it is to make up the list, but who had no authority over the swamp lands, for his own convenience put all these delinquent unknown lands into the railroad list, without the orders, knowledge or consent of the other county authorities. Lands in Iowa are only assessed biennially, in the odd years and this is the first and only time the lands are found in that list. The evidence shows that the swamp lands were excluded by the committee and county treasurer when the estimate of taxes was made upon which the compromise was based. The evidence is as follows:

McDuffee, Treasurer in 1869, testifies as follows: [folio 307 and 313].

"The compromise of taxes was talked over in 1868. That winter I made an estimate of taxes on railroad lands as near as I could get at the railroad lands. In June 1869, the amount was $22,610.04. The estimate was made on such lands as the book of original entries showed had not been entered and were not claimed by any one else up to that date excluding all school lands and lands claimed as swamp. The sum reported by me to the committee did *not include* any tax on swamp lands or school lands claimed by the county or by the American Emigrant Co. or any other lands except railroad lands. I, as treasurer marked "tax remitted" on the tax list in February, 1871. There were some lands marked remitted which were *not included* in the estimate of taxes reported by me to the committee, *these were the swamp lands.* King had the swamp lands on his list as claimed by the railroad company. I first *refused* to mark them so, but King suggested that *if they were swamp lands belonging to the county they were not taxable*, and should be marked off *and if they were railroad lands they should be marked off as included in the compromise.* After looking at it in that light I so marked them. The total amount of tax on the tax list against the railroad lands was $27,489.92 Deducting the taxes for 1858, 1859 and '60 which were not included in the estimate $3,568.35, leaves $23,921.59 as the amount due June 10, 1869, *excluding the swamp lands in suit.* The amount of the taxes due on the tax list on the land in suit June 10th 1869, was $1,377.44.

The total amount of taxes on the lands in suit and railroad lands marked "remitted" under the compromise, is $28,867.36. The $10,000. compromise money was received by me *not on the swamp* lands in this suit but on the lands on which I had made an estimate of taxes. The swamp lands were marked "tax remitted," under that compromise because I thought if they were *county* lands they were not taxable and no one would be hurt by their being marked "tax remitted" and if they were railroad lands they should be marked "remitted." They were marked remitted because I thought the taxes were illegally assessed against the swamp lands. The board of supervisors never gave me any instructions in regard to marking the taxes remitted but I did it at the earnest solicitation of Mr. King an agent of the railroad company. There was no necessity for it. I did it to satisfy King, the agent. None of the taxes on the tax book at the time of the compromise had been carried forward to the tax books of 1869 and 1870. The board of supervisors had no knowledge that the taxes had been marked "remitted" at the request of Mr. King. They gave me no authority to do so. I first learned that the railroad were claiming said swamp lands by virtue of that marking in 1874 after I had taken charge of the auditor's office."

W. D. Thompson, chairman of the committee of the supervisors to examine into the amount of the tax due on railroad lands at time of the compromise, testifies: as follows, viz: [folio 193 to 197].

"W called on the treasurer to report to us the amount of taxes due on railroad lands and requested him to report taxes only on those lands known to be railroad lands. He reported to us $22,000. The report did not include any lands other than those that would rightfully inure to the railroad company when the railroad would be completed. I made a special request to him to report only such. Smith did not furnish any list or plat; the county at the time claimed to own the swamp lands; I was aware that there was said to be swamp lands which were taxed to the railroad company, and I requested the treasurer to exclude all lands except such as belonged to the company without doubt. I believe he did exclude them from the estimate reported by us to the board. I did not understand that the report made by us included any swamp land. We believed the tax was just and legal. It was made in good faith. We had an opinion of the attorney general before us and relied upon it. I was not aware that the railroad company claimed the swamp land which was

excluded from the report. The agent of the railroad company represented that the company did not own the lands by title sufficient for taxation. [Cross examined.] It was tax on the railroad lands we were after. I had become aware that there were other lands erroneously assessed to the railroad company, and was particularly anxious to include nothing in our report only taxes on such lands as were known to be railroad lands, in order that we might know exactly what we were doing, and exactly how much we were sacrificing in the compromise. *I did not understand any portion of the* $22,610.04 *was for taxes against swamp lands.* I understood that there were some other lands assessed to the railroad company which were not included in that report."

Ankeny, chairman of the board of supervisors, testifies (folio 225–30) as follows:

"I have no recollection of anything being said concerning the swamp lands by the agent of the railroad company, or anything being said about the railroad company claiming swamp lands. Had the board supposed that the railroad company would set up a claim to the swamp lands based upon that compromise, I should have refused to compromise, and I know it would not have been made at that time. We remitted $12,610. and accepted $10,000 to save litigation. We compromised on the lands of the railroad grant. We instructed the committee to include no lands in the estimate not belonging to the railroad company. The design was not to get any lands in but what was known to be railroad lands. The board had no desire to figure up a large amount of taxes against the company, but desired the true amount to settle in some satisfactory manner without litigation. There were threats made by Mr. King and Mr. Smith that they would bring suit. (page 117) The compromise was a general release of the tax on all railroad lands whether on the tax books or not on them. The understanding was to deal liberally with the railroad company and only charge upon lands known to be railroad lands. We did not understand that there was any dispute existing between the county and the railroad company as to the lands."

John Bixby formerly clerk of the supervisors and now agent for the railroad who was a witness for defendant, testifies as follows (Cross. Ex. folio 697–706.) to-wit:

"The right to acquire the odd sections swamp land was included in the contract, and the Emigrant Company was expected

to prosecute the claim for odd sections at their own cost and expense. It was perfectly understood that they were to receive all the lands which might thereafter be declared swamp lands. During the whole time I was clerk the Emigrant Company claimed the same lands involved in this suit. The lands were allowed to remain on the tax books by me because I knew that if any lands were decided to be swamp lands and were not taxable under the terms of the contract it would do no harm to let them remain on the tax list. After the bargain with the Emigrant Company the whole swamp land matter was out of the hands of the Board, and they did not bother themselves with it for some years. From October 14th, 1862, to April, 1869, the county never asserted any claim to the swamp lands. The Emigrant Company owned the entire interest during that time and managed their own interest in their own way; the Board not exercising any act of ownership or control over the swamp land. The Board of Supervisors *did not at any time* direct the swamp lands to be taxed either to the railroad company or any other party. These odd sections swamp lands probably went on to the tax list in the same manner as other lands, in the *ordinary way of taxation*. I don't know as I ever called the attention of the Board to the fact that odd sections swamp lands were on the list to the railroad after the tax list was made out. When new members were elected *I did not inform them of what had previously been done*. New members were elected every year. It was *no part of my duty to post them*. Of the *nine* members in 1861, there were *two* on the Board of 1863. Of the Board of 1863 there were three on in 1865. Case is the only man who held from 1861 to 1868. Six of the nine members were farmers in 1865, and eight of the nine members were farmers in 1868. The Emigrant Company agents resided at Des Moines and were never present when the assessors books were submitted to the Board. The Board never changed the assessors books except as to valuation. I commenced to act as agent for the railroad in 1868. They first advertised their lands for sale and commenced selling in April, 1870."

Two of the Supervisors who were present at the time of the compromise were deceased at the time the evidence was taken; the other seven testifying as follows:

Case, a member of the Board from 1861 to 1870, (folios 166-176,) testifies:

"I understood about the year 1858 or 1859 the railroad set up a claim to the swamp lands but abandoned it in 1863 or 1864 and some of the lands they claimed in 1858 or '59 were patented

to the county in 1867 as swamp lands." The supervisors never authorized the taxation of any swamp land and the supervisors did not know any of it was on the tax list. The treasurer made the estimate. The committee did not look at the tax books. The swamp lands were not referred to during the negotiations.

Cross-examined—"I didnt know that the railroad company claimed any portion of the swamp lands. I heard from the county officers that they had abandoned their claim in 1863 or '64. (Re-examined)—"At the time of the compromise the board understood that the swamp lands and railroad lands were separate and distinct lands. The committee had not time to make a personal examination of the tax books that session."

Mercer, a member of the Board testifies, (folio 178 to 184).

"Smith represented to the board that the company did not claim any land until the completion of the road. Prior to that time it would only be a show of title. The terminus of the road was at Afton. The railroad grant and the swamp grant were considered separate and distinct lands. *The Board claimed the swamp lands previously contracted to the* Emigrant Co."

Bixler testifies (folio 185) as follows: "The board of supervisors had *resumed* control of the swamp land but a short time before the compromise of the railroad tax. We had no knowledge or suspicion of recognizing the right of the railroad company to any swamp lands. We did not design to give the company two or three thousand acres of swamp lands, in addition to remitting the taxes. We had no knowledge that we were compromising taxes on swamp land. Had any person hinted such a thing the compromise would not have been made.

Chalfon testifies as follows (folio 191): "The county at that time claimed a lot of swamp lands which was under the control of the board. We had no knowledge that the railroad company claimed the swamp lands at that time, nor that the swamp land was taxed, nor did we intend to receive taxes from the railroad company on swamp lands. It was the land that Congress gave the railroad upon which the tax was remitted. they were referred to as railroad lands."

Thompson testifies as follows, (folio 193-197):

"The county at that time claimed to own and control the swamp lands. I was not aware that the railroad company claimed the swamp lands."

Peregrine testifies as follows, (folio 221):

The board of supervisors at the time of the compromise claimed control of the swamp lands belonging to the county. The railroad also claimed some railroad lands under a grant of Congress. I understood and considered that the lands belonging to the swamp grant and those belonging to the railroad grant were separate and distinct lands." The supervisors would not have accepted taxes of the railroad company on any swamp lands knowingly.

Ankeny testifies as follows, [folio 225 and 230]:

"At the time of the compromise the county claimed to own the lands in this suit. I had no knowledge at that time that the railroad company claimed any of the swamp lands. The board had no knowledge or suspicion that they were exacting taxes on the swamp lands from the railroad company, nor did we have any suspicion that we were exacting taxes on the swamp lands claimed by the county. It was not the intention of the board to surrender the swamp lands in that compromise nor to donate lands to the company. Nothing was said concerning swamp lands in that compromise.

Wesley Homan testifies as follows, [folio 269]:

"Lived in Adams county since 1855. The county has claimed the swamp land under the swamp land grant since I have been a resident of the county."

The defendants allege that they paid taxes on the land in suit. The *burden of proof* is upon them to prove that fact. The testimony of D. N. Smith and King are the only witnesses who know anything of the compromise, and this is their evidence, [folio 724–727]:

D. N. Smith testifies, cross-examination, I was seeking to clear the railroad lands from encumbrances. I don't know what the board intended to settle. The compromise was intended to cover just what was expressed in the contract; that is, all claims for taxes upon any and all railroad lands in the county. I was informed a committee had been appointed to report the taxes; I was not present when the report was made. I drew the contract upon the agreement with the supervisors. I do not say that any of the odd section swamp land was assessed or taxed in 1861, of my own knowledge. I do not say of my own knowledge whether any part of the $22,610.04 reported by the committee was taxes on the lands in suit or not. * * * I cannot state positively

that the board of Supervisors knew the day of the compromise that the odd sections swamp lands claimed by the county was in the tax list. * * * * I cannot recollect at this time whether there was any reference made to the swamp lands pending the compromise.

J. M. King, railroad agent, testifies, (folio 621 and 622):

"The company first paid taxes in Adams county by that compromise. I had no knowledge of any taxes being paid before. I was in Quincy on the 8th of June, 1869, but went away on the morning of the 9th. Was not present when the compromise was made. I do not know on what particular land the board estimated taxes. I cannot state that the board of supervisors knew what lands the company claimed at the time of the compromise."

MARKING OF THE TAX LIST PROCURED BY FRAUD.

The sole reliance of defendant to prove that it paid the taxes is this one only fact, that the tax books on their face show that the tax is marked "tax remitted" and "tax remitted June 10th, 1869." In 40 tracts of the 66 in suit, twenty-six of the tracts are not even so marked. The copy of the tax list printed in the record, (folio 419 to 468) will fully show how the taxes appeared for the several years from 1861 to 1868 and it will be observed that only 40 of the tracts are marked remitted. This marking was done two years after the compromise, without authority and through fraud, after this suit had been pending a year, and a new amendment was then filed claiming an estoppel as will be seen by the following testimony:

McDuffee testifies as follows, (folio 310-315,):

"I, as Treasurer, marked the "tax remitted" on the list in February, 1871. King as agent of the company furnished a list of the lands to be marked "tax remitted." The marking was done by putting the word "remitted" or "tax remitted" in red ink on the margin of the list opposite the descriptions. Sometimes a large number of tracts were included in a bracket and marked "Tax remitted by the Board, June 10th, 1869." I never had a list in my possession showing what lands were claimed by the company before that time, long enough to do that marking. There was no record at any time in Adams county, showing what lands the company claimed. The officers of the county had no means of knowing except the report of the Register of the State Land Office. There was no such report printed in 1869. There

were lands marked remitted, *which were not reported in the estimate of tax given to the committee.* These were the swamp lands. King had the swamp lands on his list. At first I refused to mark them. King suggested if they were swamp they were not taxable and should be marked off, and if railroad lands should be marked as included in the compromise. The total amount marked remitted on the tax list was $28,867.36. The swamp lands were marked remitted because I thought if they were swamp land they were not taxable and no one would be hurt. I do not remember of saying anything to anyone about marking the tax list until 1874. I first communicated the circumstances of this marking when I first learned the railroad company were claiming those lands under the compromise and marking.

In the spring of 1871, my health failing, I resigned the office of treasurer; in April I started for Oregon; got as far as California, the climate not agreeing with me I returned, and moved about ten miles in the country, remaining there until the fall of 1872. It would take about *two weeks* work to examine the tax books of 1868 and previous years to find the amount of taxes marked "tax remitted." The committee of the Board did not make any estimate of the taxes I made all the estimate that was made. I had taken considerable time the fall before and made the estimate, and when the committee applied to me I added the interest which had accrued since my first estimate. The Board of Supervisors *had no knowledge* that the swamp lands had been marked "tax remitted" at the request of King They gave me no authority to do so. I first learned that the railroad were claiming said lands by virtue of such marking in 1874 after I had taken charge of the auditor's office. I assisted Wesley Homan in making exhibit "A" to his deposition. We were two weeks in preparing it. (Cross examined.) I made the estimate of delinquent taxes in December, 1868. I was told at that time to exclude lands belonging to the Emigrant Company, and they were excluded from the list. I was three or four weeks in making the statement, and to the best of my knowledge none of the county officers knew of the marking "tax remitted" on the tax list. I marked the tax list of 1868 in February, 1871, and the prior lists in a few days. I am certain the entry of "tax remitted" was not made until February, 1871. I don't remember of speaking to the Board of Supervisors in regard to these matters. The estimate was as close as I would make an estimate of taxes for an individual. The Board never directed the swamp lands to be taxed to the railroad company. I marked "taxes remitted" on all the lands on the list King furnished except some that had been paid by individuals. In marking the words "tax remitted" on the tax list I was guided by the list furnished by King."

The above evidence of McDuffee stands undisputed.

Wesley Homan testifies, (p. 119):

"I have made a computation of the amount of taxes, interest and costs from the tax books of 1868 and previous years which are marked remitted as above specified. The computation was made in 1875. The amount due June 10, 1869, was $27,489.90. The total taxes, interest and costs due June 10, 1869, on the swamp lands in suit was $1,377.44. The total tax, interest and cost, marked "remitted June 10, 1869," was $28,867.36. McDuffee, county auditor, assisted me in making the computation; it required about *two weeks* in making it. We made a careful and correct estimate. I believe it is correct; we thought we worked *diligently* ten days upon the estimate."

Let the court bear in mind that the amount of tax compromised was $22,610. That the swamp lands, some school lands and homestead lands were all in the same list of taxes with the railroad lands, the former lands being excluded from the estimate of taxes on which the compromise was based. The amount of taxes marked remitted, two years after compromise, on the tax books, under that compromise as the tax books now show, was $28,867, conclusively showing that $6,257. more of taxes were marked "remitted" than was included in the compromise.

SWAMP LAND NOT SUBJECT TO PRIVATE ENTRY IN 1854.

That the swamp lands were withdrawn from private entry in fact appears by the following evidence:

Samuel Larimer testifies, (folio 472): I have lived in Adams county twenty-three and a half years. Waitman Trippett selected the swamp lands in 1854. There was a period of time between the time that the swamp lands were taken out of market and the railroad grant in which the swamp land could not be entered. I made application for some of the swamp lands myself and could not enter it, some time before the railroad grant was made.

John W. Jones testifies, (folio 474): Lived in this county twenty-three years. United States lands were for entry in 1854 and 1855, at $1.25 per acre. Don't know of any entry in 1856. The swamp lands were taken out of market in 1854. Government lands were subject to entry in this county until some time in 1855.

Barnett testifies, (folio 478): I have resided in this county

twenty-three years. There were government lands in the county subject to entry about two years after the swamp lands were withdrawn. I acted as county judge during a portion of the time.

Daniel Richie testifies, (folio 480): Have lived in Adams county twenty-one years; I selected and entered land in 1855 and 1856; swamp lands were not subject to entry in those years; the land office was closed under the railroad land grant in May, 1856.

THE REJECTION OF THE SWAMP CLAIMS WAS MADE BY FRAUD, AND THE LANDS CERTIFIED BY FRAUD.

1st. The deposition of Steiger, defendant's witness and defendant's attorney and agent at Washington, who procured the commissioner to reject the plaintiff's claim at an *ex parte* hearing, for which the said agent received from defendant a special fee, clearly shows fraud, viz: (folio 513 and 519) "I have no information whether the state had notice of the proceedings or not The necessity of such a notice was not apparent to me. The duty imposed on the commissioner was a mere *ministerial* duty to make award without requiring notice of contest from any party. Cross-examined, (folio page 517 519). A special fee was paid me for rejected swamp land. * * * The governor or any officer of Adams county was *not notified* of my request and that of General Dix, asking the department to certify the lands to the railroad. There was in reality but one party, the State of Iowa, and therefore, properly speaking, there could be no contest, *and there was no contest October* 25th, 1861; Whether or not the swamp authorities were notified of the intended investigation, I have no knowledge."

Skinner, chief clerk of the land office at the time of the rejection, testifies, (folio 115 to 118):

"The action of the commissioner, October 25th, 1861, was *ex parte* and *instigated* by Steiger. The state had *no notice* of the proceedings *until after* the rejection was made and no party representing any interest under the swamp law was advised in any manner of the contemplated action. The action was wholly in the interest of the railroad grant and without notice to any adverse claimant, *and was not in accordance with former rulings of the office*. No party from Adams County or for the State was present or notified. The Governor of Iowa had no notice of this action until several months afterward."

"William T. Steiger, represented the interests of the Burlington & Missouri River Railroad Company in land matters before said office; *he prepared* a list of tracts selected and reported as swamp lands, having in such lists opposite the tracts respectively *certain memorandums* showing what he said was a true description of the character of the lands; *the memorandums* were made up from the plats in the general land office, without consultation of the field notes of the survey, and from certain *exparte affidavits* that had been sent to the commissioner of the general land office, under his public notice of December, 1855, made by the parties filing them with a view of entering the land, if the same should be found to be dry and fit for cultivation. The office had settled down upon the plan of referring all cases of this class to the local land officers of the proper districts for proof, all parties interested to be notified of time and place; *all affidavits of this nature were held to be void after the confirmatory act of* 1857 and remained on the files of the office as void and of no effect; *no other affidavits* to my best recollection had been received by the general land office touching any of the tracts mentioned in the list made by Mr. Steiger."

"Mr. Steiger was very active in getting the rejection of the swamp claim to these lands. His conversation was against the swamp selection, charging that fraud had been practiced in making the selections; and *using his influence* to incite and create hostilities against the swamp interest. The commissioner and chief clerk readily adopted his views and ordered the papers for rejection made at once. * * * The statement furnished by Steiger was accepted as a finality, and was never compared with the field notes, or plats, or any other papers by any officer or clerk of the general land office."

Let the court bear in mind that the *"void"* affidavits which Steiger used were gotten up by D. N. Smith in 1856, now acting as railroad agent in the compromise of taxes.

The testimony of Kriddlebaugh, (folio 672,) shows this viz:

"My brother got up some affidavits to contest the swamp lands at Council Bluffs. D. N. Smith was to furnish the money and they were to divide the land, but the government stopped the trial. The affidavits were got up in 1856. D. N. Smith was a land speculator at that time. For some reason there was no trial at the Bluffs."

Smith failed in his contest in 1856 to obtain the lands in suit. In 1869 by this estoppel he seeks to obtain his end. Certainly he knew all about the county's claim on the land.

2nd. The list of lands prepared by Steiger for rejection, sa described by Skinner's testimony, is printed in the Record, (folio 91) Ex. "C," with its classifications and explanations. The especial attention of the court is called to it. It shows on its face that the date of the selection was shown by the records in the department as of Sept. 20th, 1854. This is the exact date of the certificate of the Surveyor General, (see folio 20). It further shows by explanation "B" that these lands were "selected before the railroad right attached to the land," according to Steiger's admission. It further shows that the void affidavits on file in the office in 1856, filed for another and *ex parte* purpose, (see Lester's Land Laws, No. 575, 576, 577,) were used to bolster up this pretended investigation. These *ex parte* affidavits were filed by one Kriddlebaugh, as the employee D. N. Smith employed to do his swearing, as the basis of a proceeding or trial. The state or the other party would have had and did have a right on the trial to rebut those affidavits; but the Act of 3d of March, 1857, stopped all the contests before they were begun, and, now to use these *ex parte*, dead and void affidavits for the very purpose of unsettling titles which Congress had expressly quieted by said Act was a bold and gigantic fraud, a subterfuge dyed in moral turpitude, and invidious in disregard of honesty and law.

3d. Another proof of fraud is found in the letter of Steiger to the treasurer of the railroad, Dennison, at Boston, (folio 535 536). In that letter he divulges the theory under which the rejection was made, viz: "That the act of the commissioner was final and beyond the control of the courts." Further, the letter clearly shows that he was consulted about correspondence concerning this rejection a long time after the rejection was made. Referring to the correspondence of Harlan in February 8, 1862, and others in April of the same year, he says, "*I was consulted in reference to it and hope the results were satisfactory.*"

On what theory of honesty was it the commisioner was consulting with Steiger about the correspondence of his office, a month after the certificate had been issued? That Harlan's letter had been evasively answered; and that of the governor and county agent disregarded was a matter of congratulation between the

conspirators. No doubt the railroad officers were highly elated at "the result," as it gave them 50,000 acres of land not covered by their grant. But the exultation as to the successful result of the conspiracy demonstrates the peril of its execution.

4th. But a still stronger admission is found in the correspondence of Steiger of May 1st, and June 3rd, 1862, (folio 98, 99, 100). Some effort must be made to stop the counties of Iowa from putting settlers on the land and improving it. The railroad company could not take possession of their ill-gotten gains. Its track was 150 miles from the lands. Some way must be devised to make the counties appear to have abandoned the lands and thereby recognized the action of the commissioner. So the commissioner was requested to direct the Governor of Iowa to notify the counties not to sell or dispose of these swamp lands until they were *patented* to the state. Such an order was secured to be made at the instance of Steiger, (folio 100) June 20th, 1862. As the commissioner never proposed to issue any patent, and refused one, no doubt the railroad officials were satisfied with the result.

That the commissioner was the suppliant tool of Steiger in all his actions and consulted him about every detail and obeyed his behests in deceiving the state authorities and misleading the opposing claimants, is too evident for dispute.

ESTOPPELS APPLIED TO UNITED STATES LAND GRANTS.

If it be true that the law of estoppel applies to land grants of the United States *before* the title becomes completed in the grantee by the execution of the patent, then every grant of land is at the discretion of a *dishonest* ministerial officer, and within the grasp of avaricious corporations. The plaintiff claims under a United States grant, not yet perfected by the issue of the patent. Until the patent issue the county *could not* bring an ejectment suit or control the land so as to oust defendant. The Acts of Congress confer upon plaintiff a perfect legal right and the equitable title, but ejectment cannot be maintained upon that title.

Vide Hooper vs. Scheiner, 23 How., 235.

Fenn vs. Holne, 21 How., 481.
Bagnell vs. Broderick, 13 Peters, 436.

While the *railroad* certificate is outstanding, the county cannot go into a court of law to adjudicate its rights. The county of Montgomery, in July, 1878, received a patent from the United States for the lands included in the case reported in 38th Iowa. Adams county comes into court to set aside the certificate for the same purpose, and we are met with the objection that by not claiming the lands and disposing of them long ago, our rights are forfeited. The defendants by their *wrongful* acts have compelled the county to delay. The delay, if any, was caused in part at least by the wrong of defendant, and that delay nor any ordinary causes under it, cannot now be set up to their advantage. The certificate is *null and void;* it furnishes *no* basis for an estoppel to rest upon. *Estoppel* in this case is the "*hand maiden*" of fraud to consummate the original tort of defendant in procuring the rejection, and the title is still in the United States.

Vide Wilcox vs. Jackson, 13 Peters 499.

The statute of limitations does not commence to run till the patent issues.

Lindsay vs. Miller, 6th Peters, 666.
Burgess vs. Grey, 16 How., 48.

Adverse possession cannot exist till there is an adverse title. Had plaintiff held a patent to the lands and consented to their disposition, there might be some equity in defendant's position. The county has always been struggling for the patent, which has been obstructed by defendants, and estoppel cannot exist in such a case.

PLEA OF ESTOPPEL INSUFFICIENT.

Plaintiff further respectfully appeals to the court, whether there is any sufficient plea of estoppel presented in defendant's cross-bill, because it is nowhere alleged that defendant at the time of the compromise was ignorant that the county claimed the lands in suit, and the evidence affirmatively shows that the defendant's agents well knew of such claim. Neither does said cross-bill contain any averments that defendant was in any way deceived or paid any money, relying upon any of plaintiff's represen-

tations or conduct, which was false or deceptive, which allegations are necessary to be averred and proved to constitute an estoppel under the well recognized principles of equity jurisprudence.

INDIVIDUAL CASES.

The nine individual cases of the grantees of the railroad company consolidated, tried and determined upon the same evidence and at the same time upon issues exactly the same, and the decree of the District and Supreme Courts is the same. The plaintiff in error asks a decree in this court against all these defendants, as well as against the principal defendant.

Respectfully submitted,

GEORGE G. WRIGHT,
FRANK M. DAVIS,
Counsel for Plaintiff.

STATUTES OF IOWA BEARING ON THE ISSUES AND EQUITIES OF THESE SUITS.

1ST—SWAMP LAND GRANTED TO THE COUNTY.

[Revision of Iowa, 1860, passed January 13th, 1853, took effect February 2d, 1853.]

SEC. 925. [1] *Be it enacted by the General Assembly of the State of Iowa*, That all the swamp and overflowed lands granted to the state of Iowa by the act of congress entitled an act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits, approved September 28, 1850 be and the same are hereby granted to the counties respectively it which the same may lie, or be situated., for the purpose of constructing the necessary levees and drains, to reclaim the same—and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through, or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county.

SWAMP LANDS NOT TAXABLE

Passed April 3d, 1860, Revision of Iowa.

"SEC. 711. [2.] The following classes of property are not to be taxed, and they may be omitted from the assessments herein required. The property of the United States, and that of this state, including the university, agricultural college, and school

lands, and including all property leased to the state, during the existence of such lease; the property of a county, township, incorporated town, or school district, when devoted entirely to the public use and not held for pecuniary profit."

ACTS ACCEPTING THE RAIL ROAD GRANT

Passed July 14th 1856.

REVISION 1299. [1] *Be it enacted by the General Assembly of the State of Iowa*, That the lands, rights, powers and privileges, granted to, and conferred upon, the state of Iowa by the act of congress entitled "an act making a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of railroads, in said state, approved May 15th, 1856," be and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of congress.

SEC. 1300. (2.) That so much of the lands, interest, rights, powers and priveleges, as are or may be granted and conferred in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Burlington on the Mississippi river, to a point on Missouri, near the mouth of Platte river, are hereby disposed of, granted and conferred upon the Burlington and Missouri river roilroad company, a body corporate, created and existing under the laws of the state of Iowa.

SEC. 1311. (14). Said railroad companies accepting the provisions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the general assembly of Iowa, not inconsistent with the provisions of this act, and the act of Congress making the grant.

SEC. [16.] Be it further enacted, That any of said companies accepting the grants of lands under this act, shall take the same with the conditions imposed and incumbrances specified in this act, and shall in no event have any claim or recourse whatever on the state of Iowa, for a misapplication of said grant, incumbrances or conditions in this act imposed.

ASSIGNMENT AND SPECIFICATION OF ERRORS IN ALL THE CASES.

1. The Supreme Court of the State of Iowa erred in affirming the decree of the District Court of Iowa in defendant's favor, (folio 1038).

2. The supreme court of Iowa erred in deciding and affirming the decree of the district court, wherein it recites, viz: "That

the lands in controversy, to-wit: (here follows a description of the sixty-six forty acre tracts in suit, (same as set forth in plaintiff's petition folio 3) including the north-east of the north-east of sec. 3, tp. 71, range 34, which was not included in the rejected list of swamp land) were duly certified to defendant, as land inuring to it as alleged in the cross-bill (folio 1038)."

[*a*]. For the said north-east quarter of the north-east quarter section 3, twp. 71, range 34, in Adams county, has always been held to be shown as swamp on the field notes of the General Land Office. See letter of the commissioner, dated April 15th, 1862 [folio 485, top of page 298]. See also list of rejected swamp lands [folio 95, 147 and 975.] See also patent from the United States to the State of Iowa for the same land, [folio 79 to 80] nor was this tract marked tax remitted under the compromise, [folio 419].

[*b*.] For said certification was illegal and without authority on the part of the commissioner of the general land office, and Secretary of the Interior, and was in direct violation and disregard of the swamp land grant of September 28th, 1850, and of the former action of those officers in setting apart and reserving the said lands from sale as swamp land. And in direct violation of the confirmatory act of 3d of March 1857, [folio 85] And was in direct disregard and violation of the 3d provision of the first section of the Iowa Railroad land act of May 15, 1856. And was in direct violation of section 2449 of the revised statutes of the United States. And was in direct violation of the act of the Iowa legislature of July 14th 1856, chapter 1, [one] And was in direct violation of the former rulings of the land department. And said certificate was procured by fraud, collusion and conspiracy and against the acts of Congress and was null and void.

3d. The supreme court of Iowa erred in deciding in the language of the decree, to-wit:

"That defendant become by said certificate the legal owner of said lands." Folio [1038]. [*a*.] For said certificate was made by fraud and collusion, in violation of law and by mistake and misconstruction of law by the commissioner. [*b*.] For Congress did not intend to grant the lands in suit to defendant and the certificate is null and void.

[*c*.] The lands in suit were reserved from the operation of the act of May 15, 1856, and not granted to defendant at any

time. [*d.*] The lands in suit were not embraced in the act of May 15, 1856 and were not intended to be granted thereby.

4. The supreme court of Iowa erred in refusing to give any effect to the United States statutes above named [act of 3d of March and said 3d proviso] and in deciding that the lands inured to defendant under the act of May 15, 1856, and of the Iowa legislature of July 14th, 1856.

5. The supreme court of Iowa erred in holding that the certificate to defendant was final and not to be inquired into by them.

6. The supreme court of Iowa erred in holding in its opinion: "That the lands in suit had been *claimed* by defendant under the Congressional grant of May 15, 1856." And thus giving them a standing in court upon their certificate as if it was valid. And in deciding "that the plaintiff had full knowledge that defendant claimed to own the lands in dispute." And in deciding that the plaintiff "recognized the defendant as the owner of the lands in controversy." [folio 1053]. (*a.*) For said decision is both false in fact and false in law. That plaintiff did not know defendant claimed said lands and did not recognize them as the owner of the lands in fact nor in law, defendant had *no right, title claim or interest* whatever in or to said lands, but their pretended certificate was "*perfectly null and void.*"

7. The said court erred in deciding against the right and title of plaintiff set up in its petition and reply to cross-bill.

8. The said court erred in deciding in favor of defendant on its claim of title as set forth in its cross-bill.

9. The said court erred in holding that defendant had a legal claim on the lands in suit and in giving the void certificate a standing in court as if valid, when it was a sham, a cheat and perfectly null and void, said decree and opinion being bottomed on a denial of a federal right of plaintiff and a misapplication of federal statutes.

10. The said court erred in deciding that an illegal taxation by inferior state officers, could and did bar plaintiff's rights under the aforesaid federal statutes, and transfer lands to the railroad grant thereby.

GEO. G. WRIGHT,
F. M. DAVIS,
Counsel for Plaintiff.

SUPPLEMENT—LAWS OF IOWA.

CHAPTER VIII.

SWAMP LANDS.

AN ACT giving control of the swamp lands in the several counties of the State to the Board of Supervisors.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That the swamp lands in the several counties in the State be and the same are hereby placed under the control of the Board of Supervisors of said counties respectively.

Approved, May 28, 1861.

(Extra session, laws 1861.)

REVISION OF 1860, LAWS OF IOWA.

SEC. 987 (2). The proper officers of any county may contract with any person or company for the conveyance of said swamp lands to such person or company, for the purpose of carrying out any of the objects of internal improvement mentioned in the first section of this act, which contract shall be reduced to writing, and signed by the parties.

SEC. 988 (3). Before such contract shall be of any force or validity, the same shall be published for four consecutive weeks immediately preceding some general or special election, in some newspaper published in the county, for the length of time aforesaid, together with a proclamation of the proper officer, directing how and when the vote thereon shall be taken and returns made and canvassed; and if it shall appear that a majority of the people in any county voting thereon are in favor of the contract, then such con-

tract shall be binding upon the parties; but if a majority of the people voting on such proposition are against the same, then it shall be null and void.

SEC. 959. No swamp or overflowed land shall hereafter be sold at less than one dollar and twenty-five cents per acre.

F. M. DAVIS,
GEO. G. WRIGHT,
Counsel for Plaintiff.

112-123

JAMES H. McKENNEY,
CLERK.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1884.

NO. 334.

ADAMS COUNTY, PLAINTIFF IN ERROR,

VS.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, ET. AL.

IN ERROR TO THE SUPREME COURT OF IOWA.

Argument and Brief of Defendants on Motion to Dismiss Writ of Error.

BY SHELLABARGER & WILSON,
of Counsel for Defendants.

IN THE
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Argument and Brief of Defendants on Motion to Dismiss Writ of Error.

BY SHELLABARGER & WILSON,
of Counsel for Defendants.

MOTION TO DISMISS WRIT OF ERROR.

At the October term of this court 1883, defendants filed their Motion to Dismiss the Writ of Error in these cases, in words and figures as follows, to-wit:

In the Supreme Court of the United States.
Adams County, Plaintiff in Error,
vs.
The Burlington & Missouri River Railroad Company, et al.
No. 334.
October Term 1883.

To Said Court:

Come now the defendants in the above entitled causes, and move the court to dismiss the Writ of Error therein, and for causes of such motion assign the following:

1st. This court has no jurisdiction to try and determine the questions involved in this case.

2nd. There is not any question relating to validity of any Statute of the United States involved in the pleadings, evidence or decree in this case.

3d. The pleadings, record and decree in this cause, do not draw in question the rights, privileges, immunities, and exceptions of the plaintiff under any Statute of the United States, nor is said judgment and decision of said Supreme Court of Iowa, against any right, privilege or immunity claimed by plaintiff under such statutes.

4th. Said Writ of Error was not sued out within the time allowed by law.

5th. The record shows that the decision or judgment complained of, was made and entered on October 7, 1874, and no Writ of Error was applied for until Feb. 7, 1881.

6th. The record shows that the Supreme Court of Iowa in deciding said causes did not pass upon any question relating to the validity of any statute or treaty of the United States, nor any authority exercised thereunder.

7th. The record shows that the Supreme Court of Iowa in deciding said causes did not hold, decide or determine that any Statute of the United States was invalid, nor did it in any manner construe or found its decision upon any construction of any Statute of the United States.

8th. The record shows that the decree and judgment in said cases does not draw in question the validy of any treaty or statute of, or any authority exercised under the United States—nor does it hold such treaty, statute or authority invalid.

9th. The record shows that the Supreme Court of Iowa in deciding said causes did not pass upon or decide any question relating to the rights, privileges or immunities of the

plaintiff under any statute of the United States, nor did it decide that plaintiff was not entitled to any right or privilege under such statutes.

10th. The record shows that these cases were decided by the Supreme Court of Iowa alone upon a question of estopel set up in defendants' Cross Bill.

11th. The record shows conclusively that the defendants in their Cross Bill set up the fact that the plaintiff more than ten years prior to the commencement of these suits voluntarily abandoned all claim of title or ownership to or in the lands in controversy, and from that time up to the commencement of this suit, recognized and treated defendants as the rightful owners thereof, and thereby induced defendant to pay taxes thereon and sell and convey said lands as its property, and that plaintiff was thereby estopped from now claiming title to said lands, and that the decision of the Supreme Court of Iowa is founded alone upon this defense, and said court, did not discuss, pass upon or decide any other question in the case.

12th. This court has no jurisdiction to review or re-examine such question of estopel passed upon by the Supreme Court of Iowa.

SHELLABARGER & WILSON.
Attorneys for Defendants.

WRITTEN AGREEMENT.

At the October term of this court 1883, the parties filed herein their written stipulation to continue these cases until the present term of this court, and also the Motion to Dismiss Writ of Error, which is now presented to the court.

STATEMENT OF THE CASE.

This is an action in equity by the plaintiff, Adams County, in the State of Iowa, to cancel defendants' title to 2640 acres of land, situate in said county, and quiet the same in plaintiff.

The plaintiff claims, in its pleadings, that it became, and is the *equitable owner* of said lands, under and by virtue of an act of Congress, approved Sept. 28, 1850, and known as the Swamp Land Grant, wherein swamp lands were granted to the State of Iowa, and an act of the Legislature of Iowa, of date Feb. 22, 1853, wherein such lands are granted to the several counties in said state, wherein they are located. That said lands were *swampy* and unfit for cultivation. That it duly selected and identified said lands, in accordance with the provisions of said grants, and thereby became the equitable owner thereof. That its right and title to said lands were subsequently confirmed by an act of Congress of date March 3, 1857.

That the defendant, the Burlington & Missouri River R. R. Company wrongfully and fraudulently obtained the legal title

to said lands, by procuring certificates therefor, as lands enuring to it under an act of Congress, approved May 15, 1856, and an act of the Legislature of the State of Iowa, of date July 15, 1856.

That said Rail Road Company and its grantees now claim to own said lands under said grants and certificates.

The plaintiff brings seperate suits against the purchasers of divers tracts of said lands. By order of the court said actions were consolidated and tried together on the same evidence.

The defendants claim that they are and became the legal and equitable owners of said lands by virtue of certificate issued to said Rail Road Company therefor, as enuring to it under said act of congress approved May 15th, 1856.

2nd. They deny that said lands are *swamp lands* within the meaning of said swamp land grant, and hence plaintiff could not and did not acquire any interest or right therein or thereto under said grant.

3rd. They deny that said lands were ever *selected or identified* as *swamp lands*, and hence plaintiff acquired no right thereto or interest therein under said confirmatory act of congress.

ESTOPEL.

4th. The defendants in Cross Bills, each specially claim, that by reason of certain contracts of the plaintiff in reference to said lands, and its acts and conduct in relation thereto, (all of which are fully set out in defendants' answers) the plaintiff is *estopped* from claiming the right or title to said lands as against defendants

THE DECISION OF THE SUPREME COURT OF IOWA.

By reference to the three opinions of the Supreme Court of Iowa filed in this case, (all of which are printed in full in the record) it will be seen that this case was decided and determined *alone* upon the plea of *estopel*.

That court held and determined, that by reason of the facts set up in defendants' answers, and established by the evidence, the plaintiff was, inlaw and equity, estopped from claiming the right or title to the lands in controversy as against defendants.

No other issue, presented by the pleadings, was examined, discussed or decided.

No other question was involved in their decision, and by our motion to dismiss this appeal or writ of error in this case, we deny the jurisdiction of this Court to review the decision of the Supreme Court of Iowa upon this question of *estopel*, and respectfully insist

1st. That there is no federal question presented for decision by the pleadings in the case.

2nd. There was no federal question decided in this case by the Supreme Court of Iowa.

The decision of the Supreme Court of Iowa was not against the validity of any statute of the United States.

4th. That no rights, privileges or immunities of the plaintiff under any statute of the United States was involved or drawn in question by the decision of the Supreme Court of Iowa in this case, and such decision was not against any rights of the plaintiff under any such statute.

ARGUMENT.

I

There was no federal question presented in the pleadings for the reason that the *validity* of the acts of congress under which the parties claim are not thereby *drawn in question*. It is true that each party claims the lands in controversy under different acts of congress, but the validity of neither of these laws is questioned by either party. Each of these grants were in the nature of a float. Under the swamp land grant the state did not become entitled to certain described tracts of land, but only to such lands as were in fact of a swampy character, and no title or right could, under this grant pass to the state or its grantee to any lands except such as upon proper examination were found to be of this character. Hence, if the lands in controversy were not in fact swamp lands, they could not and did not pass to plaintiff under the grant.

The defendants claimed they were not *swamp* lands, but were dry and arable, and in this claim they were sustained by the field notes of the original survey, and the evidence taken and filed in this case. Of course the plaintiff denied this claim of the defendants. Now here was an issue presented by the pleadings as to the character of these lands, but can it be said that such issue drew in question the validity of said statutes or grants or either of them.

As we understand the former decision of this Court, the fact that a party claims a right, or claims property under a federal statute does not necessarily draw in question the validity of such statute, or raise a *federal* question within the meaning to Sec. 709 of the Statutes of the United States.

In the case of *Calcote* vs. *Stanton* 18 Howard Page 243 this court said:

" It is not enough that the decision of the State Court was " against a party claiming title under some statute of or com- " mission held under the United States. The origin of the " title may be but an accident of the controversy, and not the " subject or substance of it. The suit must have drawn in

" question the construction of such statute or commission,
" and the judgment of the State Court must have been adverse
" to the claim set up under it."

Also the following cases decided by this Court, make clear the same proposition

" If both parties claim under a treaty, without contesting
" its validity or construction, and the contest arises from some
" question without or *dehors* the treaty, no writ of error lies."
" (Gill vs. Oliver, 11 How. 529.)"

" Where both parties claim under patents from the State
" for land previously granted to it by the United States, no
" writ of error lies. (Shaffer vs Scudday, 19 How 16)."

" Where both parties claim under the same grantor and
" concede the validity of his title, no writ of error lies al-
" though his title depends upon a treaty or act of congress."
(Romie vs. Casanova, 91 U. S. 379.)

II.

Whatever view the court may take of the questions and issues presented by the pleadings in this case, we think it will be conceded that the Supreme Court of Iowa in passing upon it did not decide or pass upon any question relating to the validity of any statute of the United States, nor the rights of the plaintiff thereunder.

That Court simply held and determined, that the plaintiff, by its conduct and contracts in relation to the lands in controversy, was *estopped* from claiming title thereto, as against these defendants.

This is the *only* question examined or discussed, this is the only question or issue decided, all of which clearly appears from the opinions of the Court which are printed in full in the record. Does a writ of error lie to this Court from the decision of the Supreme Court of Iowa upon this question of estopel? If not, the motion to dismiss must be sustained.

The following is

A COPY OF THE STATUTE

upon which the plaintiff bases its right to have this case reviewed by this court viz:

" Sec. 709.—A final judgment or decree in any suit in the
" highest Court of a State, in which a decision in a suit could
" be had, where is drawn in question the validity of a treaty
" or statute of, or an authority exercised under the United
" States, and the decision is against their validity; or where
" is drawn in question the validity of a statute of, or an au-
" thority exercised under any State, on the ground of their be-
" ing repugnant to the Constitution treaties, or the laws of the
" United States, and the decision is in favor of their validity;

" or where any title, right, privilege, or immunity specially set " up or claimed, by either party, under such constitution, " treaty, statute, commission, or authority, may be re-exam- " ined and reversed or affirmed in the Supreme Court upon a " writ of error."

Now if we have correctly stated the question decided by the Supreme Court of Iowa, it is evident, we think, that this section does not authorize the court to review this case upon a writ of error.

If it be true that the Supreme Court of Iowa have simply decided that plaintiff was by its acts and contracts estopped from claiming the lands in controversy, and this was the *only* question decided, or the controlling question in the case, then it necessarily follows that the validity, nor rights of the plaintiff under a federal statute were not drawn in question, nor determined, and hence, there is no question which this Court can review. The following cases decided by this court, seem to be in point, and if we understand them correctly, they clearly determine this controversy.

CASES.

" A judgment or decree cannot be re-examined merely be- " cause a Federal question was presented to the State Court " for determination. It must appear that the question was in " fact decided, or that its decision was necessarily involved in " the judgment or decree." Bolling vs Lersner, 91 U. S. 594.

McManus vs. Sullivan, 91 U. S. 578;

Brown vs. Atwell, 92 U S. 327.

" The true test is not whether the record exhibits an ex- " press statement that a Federal question was presented, but " whether such a question was presented and decided adverse- " ly to the Federal right."

Murray vs. Charleston, 96 T. S. 432.

" In order to give jurisdiction to the Supreme Court it is " not only necessary that some of the questions mentioned in " the section should exist in the record, but that the decision " thereof was controlling in the disposition of the case."

Citizens' Bank vs. Board, 98 U. S. 140.

" If the judgment of the State Court is based on a ground " over which the Supreme Court has no jurisdiction, as well as " on a Federal question, the Supreme Court will not take jur- " isdiction of the case, for it must assume that the ruling of " the State Court on the question over which it has exclusive " jurisdiction, is correct, and it could not reverse the judgment " although it should decide the Federal question in favor of " the plaintiff in error."

Rector vs. Ashley, 6 Wall. 142;

Cockroft vs Vose, 14 Wall. 5;

Moore vs. Mississippi, 21 Wall. 636;
Kennebec Railroad vs. Portland Railroad 14 Wall. 23.

" Where it appears by the record that the judgment of " the State Court might have been basedeither upon a law which " would raise a questionof repugnancy to the Constitution, " laws or treaties of the United States, or upon some other in- " dependent ground, and it appears that the court did in fact " base its judgment on such independent ground, and not on " the law raising the Federal question, no writ of error lies."

Klinger vs. State, 13 Wall. 257.

" It must appear from the record of the case, either in ex- " press terms or by clear and necessary intendment, that one " of the questions which the Supreme Court has jurisdiction to " re-examine and decide, was actually decided by the State " Court."

Medberry vs. State, 24 How. 413;
Christ Church vs. Philadelphia, 20 How. 26;
Mardock vs. Memphis, 20 Wall. 590;
Smith vs. Adsit, 16 Wall. 185;
Commercial Bank vs. Buckingham, 5 How. 317;
Crowell vs. Randall, 10 Pet. 157;
Ocean Ins. Co vs. Polleys, 13 Pet. 157;
Edwards vs. Elliott, 21 Wall. 532;
Smith vs Hunter, 7 How. 738;
Klingner vs. State, 13 Wall. 257;
Walker vs. Villavaso, 6 Wall. 124.

" It is not sufficient that the record shows that an act of " Congress was applicable to the case if it was not in fact ap- " plied to it by the State Court."

Crowell vs. Randall, 10 Pet. 368;
Maxwell vs. Newbold, 18 How. 511.

" The Supreme Court is not at liberty to resort to forced " inferences and conjectural reasonings, or possible or even " probable suppositions of the points raised and actually decid- ed."

Ocean Ins. Co. vs Polleys, 13 Pet. 157.

" If the record does not show that a point on which a writ " of error will lie was drawn in question, the Supreme Court " will not take jurisdiction on the ground that counsel brought " such a point in question in argument."

Railroad Co. vs. Rock, 4 Wall. 177.

" It is not enough that the record shows that the plaintiff " in error contended and claimed that such question was " there, and that the claim was overruled by the court, but " it must appear by clear and necessary intendment that the " question must have been raised, and must have been de- " cided in order to induce judgment."

Commercial Bank vs. Buckingham, 5 How. 317.

" No writ of error lies if the record does not show that a " federal question was presented and decided, although such a " decision is alleged in the petition for the writ of error, for " that petition forms no part of the record.

Warfield vs. Chaffe, 91 J. S. 690.

" If the opinion of the State court is made a part of the " record by the State laws and is explanatory of the judgment " it will be treated as a part of the record.

Couisin vs. Blanc, 19 How. 302;
Grand Gulf R. R. Co. vs. Marshall, 12 How. 165;
Delmas vs. Ins. Co., 14 Wall. 661.

" If the record shows upon its face that a federal question " was not necessarily involved, and does not show that one was raised the Supreme Court will not go outside of it to the opinion or elsewhere to ascertain whether one was in fact decided. Moore vs. Mississippi, 21 Wall. 636.

" The certificate is not conclusive that a point was decid- " ed in the State Court which may be re-examined in the Su- " preme Court, for that would make the State Court judges of " the jurisdiction of the Supreme Court."

Lowler vs. Walker, 14 How. 149.

" The office of the certificate is to make more certain and " specific what is too general and indefinite in the record."

" If the record does not show that a federal question was " raised and decided, the certificate is not sufficient to support " the writ of error.

Parmalee vs. Lawrence, 11 Wall. 36
Brown vs. Atwell, 92 U. S. 327;
Commercial Bank vs. Buckingham, 5 How. 317;
Lawler vs Walker, 14 How. 149;
Railroad Company vs. Rock, 4 Wall. 177.
Caperton vs. Bowyer, 14 Wall. 216.

" Although the complainant claims a right under an act " of Congress, yet if the State Court dismiss the bill for want " of jurisdiction, no writ of error lies."

Smith vs. Adsit, 16 Wall. 185.

" No writ of error lies if the bill was dismissed because " the evidence did not disclose any ground for equitable relief, " although mention is made incidentally in the decree of a " Federal statute."

Smith vs. Adsit, 23 Wall. 368.

" When a decision holding a contract void is made by a " State court upon the general principles by which courts de- " termine that a transaction is good or bad on principles of " public policy, no writ of error lies."

Tarver vs. Keach, 15 Wall. 67.

" If the State Court dismisses a bill which seeks to have

" a patent declared void because it was procured by fraud, no " writ of error lies."

Semple vs. Hagar, 4 Wall. 431.

" No writ of error lies merely because the evidence adduc- " ed in relation to a right set up under an act of Congress was " overruled." Scott vs. Jones, 5 How. 343.

" If both parties claim under a treaty without contesting " its validity or construction, and the contest arises from some " question without or *dehors* the treaty, no writ of error lies."

Gill vs. Oliver, 11 How. 529.

" The jurisdiction of the Supreme Court on a writ of error " to a State Court, is limited to a decision of the questions " mentioned in the statute, and does not extend to the whole " case." Murdock vs. Memphis, 20 Wall. 590.

Gelston vs. Hoyt, 3 Wheat. 246.

Doe vs. Eslava, 9 How. 421;

Montgomery vs. Hernandez, 12 Wheat. 129.

Doe vs. Mobile, 9 How 451;

Matthews vs. Zane, 7 Wheat. 164.

" It was foreseen that the parties might claim under vari- " ous titles, and might assert various defenses altogether in- " dependent of each other. The court might admit or reject " evidence applicable to one particular title, and not to all, " and in such cases it was the intention of Congress to limit " what would otherwise unquestionably have attached to the " court the right of revising all the points involved in the " cause. It therefore restrains this right to such errors as re- " spect the questions specified in the section."

Martin vs. Hunter, 1 Wheat. 304;

Lytle vs. State, 22 How. 193.

" Where the defense of the statute of limitations is inter- " posed, and has no connection with the title of the plaintiff " in error, the Supreme Court cannot revise the decree of the " State Court in this respect."

Lytle vs. State, 22 How. 192.

" The Supreme Court has no power to interfere with that " portion of the decree which declares that some of the defend- " ants are bona fide purchasers without notice of the plain- " tiff's title."

Lytle vs. State, 22 How. 193.

" If the State Court did not consider a particular question " as raised by the record, no decision will be given thereon."

Bartemeyer vs. Iowa, 18 Wall. 129.

" The decision by the State Court of all matters depending " exclusively on the laws of the State is conclusive.

Bush vs. Cooper, 18 How. 82.

" A motion to dismiss the writ of error may be brought on " with the final hearing."

Maguire vs. Tyler, 1 Black. 195.

" The writ of error will be dismissed if no federal question " is referred to in the record or in the opinion of the court.

Marqueze vs. Bloom, 16 Wall. 351.
Chouteau vs. Marguerite, 12 Pet. 507.
Tagrange vs. Chouteau, 4 Pet, 287.
Hurley vs. Street, 14 Wall. 85;
New Orleans vs. De Arman, 9 Pet. 223;
Congdon vs. Goodman, 2 Black, 574;
Poydras de Landres vs. Treasurer, 18 How. 192.
Porter vs. Foley, 24 How. 415;
Steines vs. Franklyn County, 14 Wall. 15;
Medberry vs. State, 24 How. 413;
Mitchell vs. Lenox, 14 Pet. 46;
Grand Gulf R. & B. Co. vs. Marshall, 12 How 165;
Crowell vs. Randall, 10 Pet. 368.

SHELLABARGER & WILSON,
of Counsel for Defendant.

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IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1884.

NO. 334.

ADAMS COUNTY, PLAINTIFF IN ERROR,

VS.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF IOWA.

Brief of Defendants,

BY SHELLABARGER & WILSON,
of Counsel for Defendants.

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of Counsel for Defendants.

If our motion to dismiss the Writ of Error in this case be overruled; then we submit the following brief, on the question involved in this case.

STATEMENT OF THE CASE.

This is an action in equity by the plaintiff, Adams county, in the State of Iowa, to cancel the defendants' title to 2640 acres of land, and quiet the same in plaintiff.

THE PLAINTIFF CLAIMS,

in its pleadings, that it became, and is the *equitable owner* of said lands, under and by virtue of an act of Congress, approved Sept. 28th, 1850, and known as the Swamp Land Grant, wherein Swamp Lands were granted to the State of Iowa, and an act of the Legislature of Iowa, of date Feb. 22nd, 1853, wherein such lands are granted to the several counties in said State, wherein they are located. That said lands were *swampy* and unfit for cultivation. That it duly selected and identified said lands, in accordance with the provisions of said grants and thereby became the equitable owner thereof and entitled to a certificate or patent therefor. That the right and title to said lands were subsequently confirmed by an act of Congress, of date March 3rd, 1857.

That the defendant, the Burlington & Missouri River R. R. Co. wrongfully and fraudulently obtained the legal title to said lands, by procuring certificates therefor, as lands enuring to it under an act of Congress, approved May 15th, 1856.

That said Railroad Company and its grantees now claim to own said lands under said grants and certificates.

The plaintiff brings separate suits against said Railroad Company, and against divers purchasers of divers tracts of said lands from said company. By order of the Court said actions were consolidated and tried together on the same evidence.

THE DEFENDANTS CLAIM,

that they are and became the legal owners of said lands by virtue of certificate issued to said Railroad Company therefor, as enuring to it under said act of Congress approved May 15th 1856.

2nd. They deny that said lands are *swamp lands* within the meaning of said Swamp Land Grant, and hence plaintiff could not and did not acquire any interest or right therein or thereto under said grant.

3rd. They deny that said lands were ever *selected or identified as swamp lands*, and hence plaintiff acquired no right thereto or interest therein under said confirmatory act of Congress of March 3rd 1857.

4th. Each of the purchasers from said Railroad Company also set up the special claim or defense that they have a valid *preemption right* or claim to the different tracts or parcels of land claimed by them.

ESTOPEL.

5th. The defendants, in Cross-Bills, each specially claim, that by reason of certain contracts of the plaintiff, in reference to said lands, and its acts and conduct in relation thereto, (all fully set out in defendant's answers), the plaintiff is estopped from claiming the right or title to said lands, as against defendants.

THE DECISION OF THE SUPREME COURT OF IOWA.

By reference to the three opinions of the Supreme Court of Iowa, filed in that case, (all of which are printed in full in the record), pages to , it will be seen that this case was decided and determined *alone* upon the plea of *Estoppel.*

That Court held and determined, by reason of the facts set up in defendants answers, and established by the evidence, the plaintiff was, in law and equity, estopped from claiming the right or title to the lands in controversy, as against defendants.

No other issue was examined, discussed, or decided in the case.

HISTORY OF THE CASE.

The case was commenced December the 10th, 1869. The state District Court rendered a decree for plaintiff. Defendants appealed to the Supreme Court, where this decree was reversed, upon the ground that the abstract showed that plain-

tiff had sold and disposed of its interest in the lands in controversy, to the American Emigrant Company,and hence could not maintain this action; but *Cole J.*,in the opinion filed in the case, says:

"The defendant also averred and proved, that after the controversy about these lands and between the same parties herein, before the Secretary of the Interior, who certified the lands to the defendant immediately thereafter, and in October 1861, the plaintiff had recognized the defendant as the owner thereof, and had collected taxes thereon from defendant for every year since 1861, and in one or years had advertised and sold them for such taxes, and also that the defendants had sold some of the lands to various persons, not parties to this action, who had been in possession, by actual residence thereon, for periods varying from two to six years each.

Under these circumstances, and the rule as established in the case of The Iowa Railroad Land Co. vs. Story county, 36 Iowa, 48, it may not admit of much doubt that the county is now estopped from asserting any title. But this point we need not definitely decide, because it clearly appears from the first point above stated, that the County is not the owner, regardless of the estoppel."

ON RE-HEARING

the Supreme Court, adhered to its former decision, reversing the decree of the District Court, but placed it upon the ground that plaintiffs were estopped from claiming title to the lands in controversy by reason of the facts set up in defendants answer and Cross-Bill. The following is a copy of the opinion relating to this question to-wit:

OPINION.

The lands in controversy had been claimed by the defendant under the Congressional land grant of May 15th, 1856. The county claimed the same lands as swamp lands. On the 25th of October, 1861, the claim of the county was rejected, and the land certified by the proper department at Washington as belonging to the defendants. Whether the decision was right or not, we are not called on now to decide, but from

this time, namely, from 1861, these lands were charged with taxes for almost every year as the property of defendants.

In 1868 there stood charged on the books of the county against the defendant tax and interest to the amount of $22,510, for various years, on lands of the defendants within the county, the lands in controversy being included among those upon which this amount of taxes and interest was charged. The railroad company were claiming that some of these taxes were illegal; and at the June session, 1869, of the Board of Supervisors, the defendants presented a petition to the Board, stating such illegal assessments, etc., and asking the Board to remit such illegal taxes and have them stricken from the tax book. The matter was referred to a committee of the Board, who reported that "there is charged against the railroad company taxes and interest to the amount of $22,610.04 from the year 1861 to 1868, inclusive," and recommended that the sum of $12,610.04 be remitted upon payment of the balance, $10,000, by the railroad company within ten days. This proposition the company accepted, and paid the money, $10,000, in full of all taxes, interest and penalties assessed upon their lands in the county, and it was so received and receipted for by the county. Thus the county, with full knowledge that the defendants claimed to own the lands in dispute, that they were placed upon the tax books of the county as defendants' property, that taxes were charged against them with other of defendants' lands, for nearly every year from 1861 to 1868 inclvsive, and were then among the lands of defendants charged with taxes, which, in the aggregate, amounted to over twenty thousand dollars, the county secures to be paid as a compromise of the taxes charged against the defendants, (some of which were claimed by defendants to be illegal), the large sum of ten thousand dollars upon all of the land taxed to defendants, without making any claim to any of the lands thus taxed to defendants, as being owned or claimed as the lands of the county. The testimony shows that more than $600 of the sum was paid upon the lands now claimed in this action by the plaintiff. It cannot be presumed that this compromise could have been effected, and this large sum of money obtained from the defendants, if the county had asserted a claim to these lands at that time.

The county, having thus recognized the plaintiff as the owner of the lands in controversy, and secured an advantage to its self thereby, is now estopped from denying the existence of the fact upon which such advantage was secured. Having remained silent when it should have spoken, it must now remain silent when it desires to speak. Lucas vs. Hart, 5 Iowa, 415; Davidson vs. Follett, 27th Iowa, 217; Iowa Railroad Land Co. vs. Story County, 36th Iowa, 48; Hall vs. Doran, 13th Iowa, 368; Bullis vs. Noble, 36th Iowa, 618.

The case being remanded to the District Court for decree, the plaintiff filed in that court, its amended replication, averring that said lands were taxed by the county authorities through *inadvertence and mistake*. The District Court, on motion of defendants, struck this pleading from the file, and entered a decree for defendants, in accordance with the opinion of the Supreme Court. Plaintiff appealed from this ruling, and it was reversed by the Supreme Court, and remanded to the District Court for a

NEW TRIAL UPON ONE QUESTION,

viz: by this opinion, plaintiff was, upon such new trial, permitted to show, if it could, that said lands were taxed "*through inadvertence and mistake*," as alleged in its amended pleading. This was the only question to be retried; see record page 621. On this *new trial* the District Court rendered the following

DECREE.

Now on this 3rd day of May, 1878, it being the eleventh day of the April term of said court, this cause was submitted upon the pleadings and following evidence to-wit:

And after considering the evidence and argument of counsel, the court finds that by the use of reasonable diligence the plaintiff could have procured his alleged new evidence before the former submission of this cause; that defendant is now entitled to a decree to the lands in controversy in accordance with the former decision of the Supreme Court in this case. It is therefore ordered and adjudged that the plaintiff's bill be, and the same is hereby dismissed; that the decree heretofore entered in favor of plaintiff, be and the same is set aside and

cancelled. The court further finds that the allegations of dedants' Cross-Bill are true, and that said defendant is entitled to the relief prayed for. That the lands in controversy, towit, [Here follows a description of sixty-six forty-acre tracts in suit,] were duly certified to said defendant as land inuring to it, as alleged in the Cross-Bill; that the defendant became thereby the legal owner of said lands, as alleged in said Cross-Bill, and that plaintiff has, since 1862, recognized and treated said defendant as the owner of said land, as alleged in said Cross-Bill, and plaintiff is now, by such acts and conduct, estopped from claiming the same, or denying defendant's title thereto. It is therefore ordered, adjudged and decreed by the court that the defendant's right and title to said lands under said railroad grant be, and the same is hereby, confirmed as against the plaintiff, and that the title to all parties of said land which the defendant has not conveyed is hereby quieted in defendant, and that the plaintiff is hereby forever barred and estopped from claiming said lands, or any right, title, or interest therein, or any portion thereof, from the said defendant, or any of its grantees.

Plaintiffs again appealed from this decree which was affirmed by the Supreme Court upon the ground that the new evidence failed to show that said lands were taxed *through inadvertence and mistake*, and that plaintiff was estopped from claiming title thereto by reason of the facts set up in defendant's answer and Cross-Bill, and established by the evidence. The following is a copy of this

3RD OPINION.

The lands in controversy amount to about twenty-six hundred acres. This Court found upon the former appeal that they were assessed to the defendant nearly every year from 1861 to 1868 inclusive, and that the plaintiff received from the defendant taxes on the land to the amount of more than six hundred dollars. The mistake, if any, in assessing this land to the defendant, and collecting taxes upon it, arose from the fact that the defendant was the undisputed owner of a quantity of land in the county, and in making out the list of the defendant's lands, it was inadvertently made to comprise not

only what the defendant confessedly owned, but all that it claimed to own, including the lands in question.

That a mistake should be made for several years in regard to the taxation of twenty-six hundred acres of land, appears upon the face of the transaction a strange circumstance, and it is not easily credible. Upon looking into the special facts of the case it appears still less credible. The swamp claim to the land was rejected Oct. 25th, 1861, and the land approved to the railroad company, and certified to it the following March. *After the swamp claim was rejected, the Board of Supervisors made an order for the taxation of what they called the railroad lands.* The lands in controversy were not specially mentioned in the order, *but they were included in the next tax list made out.* And *the clerk of the Board testifies that the Board had knowledge that the lands in controversy were included in the list.*

We are satisfied from the evidence that the understanding was that the railroad company, and not the county, probably owned the land, and that *the determination of the county was to assess it at all events*, and gain the taxes if it lost the land.

Afterwards, in a general compromise of taxes, the taxes upon this land *were compromised and paid* as was determined on the former appeal.

We are of the opinion, then, that the judgment of the District Court be affirmed.

ON REHEARING

the following additional opinion was filed in the case.

4TH OPINION.

Rothrock, J.: A rehearing having been ordered in this case elaborate arguments have been made by counsel, and we have again examined the questions involved, and the result of such examination is, that we adhere to the conclusion announced in the foregoing opinion. When the cause was reversed upon the appeal, as reported in 44th Iowa, 335, it was remanded for one purpose only, which was to allow the plaintiff to show that the lands were taxed by inadvertence and mistake, and an examination of the statement of facts preceding the opin-

ion of that case, shows that this was the only question presented in the court below, and in this court.

This court had found upon the first appeal, (36 Iowa, 506) that the lands in controversy were taxed for almost every year from 1861 to 1868, inclusive. Upon that appeal there was a trial *de novo* in this court, and defendants might have had, at their option, a decree in this court. It was, however, remanded; whereupon the application was made to show, not that the lands have not been taxed, but to show that such taxation was by mistake and inadvertence, was discovered after the first trial. Upon the second appeal it was remanded to allow the plaintiff to introduce evidence upon that new issue, and for no other purpose. It is not improper to say that this court did not intend to re-open the whole case. The writer hereof consented to that opinion reluctantly, and only because it narrowed the inquiry to the new issue. The allowance of an amendment, and the tendering of a new issue in an equity case, after a trial *de novo* in this court, and after *procedendo* filed in this court below, should be allowed only upon the strongest showing of accident, mistake, or for matters arising subsequent to the decree, or the like. A party cannot be allowed to try his case by installments, or by piecemeal. Such a practice would make litigation practically endless. Sexton vs. Henderson, 47 Iowa, 131.

We have said this much in addition to what is contained in the foregoing opinion, to further show the manifest impropriety of again determining the question as to just what portion of these lands were taxed, and for what years they were taxed. That was determined upon the first appeal. We desire to add nothing to what has been said as to the taxation having been the result of mistake or inadvertence. Counsel have discussed this question at length. We have re-examined the evidence and are satisfied with the conclusion already announced. It is said in the foregoing opinion that some of the members of the Court have cause to entertain defendants as to the correctness of the ruling, holding that there was an estoppel in this case. It may also be said that some of us are without doubt as to its correctness, upon the facts found in the first opinion on rehearing. But what the individual opinion of the members of the Court may have upon the original ques-

tion is of no importance, unless we are convinced that the public interests, and a correct and just administration of the law require that the case should be overruled. That decision was made in 1874. It announced the rule in effect that a county is bound by the law of estoppel the same as a natural person. The same principle was announced by the Iowa R. Land Co. vs. Story Co., 36 Iowa, 48. The doctrine is approved in Audubon Co. vs. Am. Emigrant Co., 40 Iowa, 460, and recognized in the county of Buena Vista vs. Iowa Falls and Sioux City R. Co., 46 Iowa, 226, and in Howard Co. vs. Bullis, 49 Iowa, 579. It has been followed by the Circuit and District Courts, and has come to be understood as the settled law of the State. We think it ought not now to be disturbed.

Former opinion adhered to.

WRIT OF ERROR.

The plaintiff brings this case to this court on a Writ of Error to the Supreme Court of Iowa, under provisions of sec. 709 of the statutes of the U. S., and the first question that arises is, what questions will this court investigate and determine in a case brought here on a Writ of Error. It will be seen by the brief filed herein by the plaintiff, that counsel undertakes to discuss the entire case, the facts as well as the law They treat this case as if it is to be tried *de novo*. We do not so understand the law. We do not understand that any questions will be examined or determined by this court on a Writ of Error, except the questions of law arising upon the record. In the case of Wiscart vs. Dauchy, 3 Dall. 321, it is said 'that the terms Writ of Error and appeal are to be understood according to their ordinary acceptation. An appeal is a civil law process, and removes a cause entirely, subjecting the law and fact to a review and retrial. A Writ of Error is a common law process, and removes for re-examination nothing but the law." U. S. vs. Goodwin, 7 Cranch. 108. Hence we conclude the only questions to be determined by this court are questions of law arising upon the records; that this court will not undertake to investigate the evidence or finding of facts in the case.

ASSIGNMENT OF ERRORS.

The second division of sec. 4 of rule 21 of this court provides that plaintiff's brief shall contain "the assignment of errors relied upon, which, in cases brought up by a writ of error, shall set out separately and specifically, each error asserted, and intended to be urged." We will now call your attention to the fact that the assignment of errors in this case, not only fails to comply with this rule, but that the errors therein assigned do not appear in the record of the case. The record does not sustain the plaintiff in its claims that the Supreme Court of Iowa made the decisions referred to, and said assignment and an examination of the questions raised in the assignment, necessarily requires an examination of all the evidence and all of the facts in the case. In fact, they demand a trial *de novo* of the case, which, we understand, cannot be had in this court on a Writ of Error. We now proceed to examine the several errors assigned. It is claimed,

I.

"That the Supreme Court of the State of Iowa, erred in confirming the decree of the District Court of Iowa, in defendant's favor."

Now we inquire what question of law does, or can arise upon this question of assignment. How is this court to determine whether or not the Supreme Court of Iowa erred in confirming the decree of the District Court without examining every question of fact, and all the evidence in the case, and the law applicable thereto. Under the law governing the proceedings on a Writ of Error, and the rules of this court, above referred to, we insist that this assignment presents no question which can be reviewed by this court.

II.

"The Supreme Court of Iowa erred in confirming the decree of the District Court, wherein it recites that the lands in controversy were duly certified to defendants, as land enuring to it, as alleged in the Cross-Bill."

To determine this question, the court must necessarily examine all of the evidence in the case. There is no finding of facts, or Bill of Exceptions in the record. There is nothing except the evidence and the opinions

of the Supreme Court of Iowa. We do not understand that the opinions filed by the Supreme Court of a state, are, or should be treated or considered as a finding of facts in the case. They are not required to set out the facts of the case in their opinion. They may, and usually do, refer to some of the facts found by them upon which their opinion is based, but it does not follow that in doing so, they refer to *all* the facts disclosed in the evidence, which influenced them in forming the opinion that they did.

If we are mistaken in our view of the law governing this Court in the examination of a Writ of Error; if it be true, as seems to be claimed by the plaintiff that the case is to be tried *de novo*, then in answer to this assignment we claim that the fact objected to therein, that is, that the lands "were duly certified to defendant, as land enuring to it," has never been disputed in the case; in fact, plaintiff's bill filed in this case recognizes and admits this fact, and seeks to have such certificate cancelled, and the title thereby acquired by defendants, conveyed to plaintiff.

The fact that the lands were certified in due form to defendant, has never been denied, and the certificates filed in evidence would clearly establish this fact had there been any issue in regard to it. This recital in the decree, then, was simply a recital of admitted facts in the case. By this recital the Court did not decide that the defendant was entitled in law or in equity to have said lands certified to it. It did not decide that the defendant was the real owner of said lands under the act of Congress known as the Railroad Grant. It did not decide that said certification was valid. It did not decide any question relating to the validity of such certificate. It did not decide any objection that was raised in evidence by plaintiff as to the validity of such certificates. It simply recited the fact that the certificate was in due form; that the lands had been duly certified, a fact which we say was admitted in plaintiff's pleadings in this case.

III.

"The Supreme Court erred in deciding in the language of the decree, that the defendant became, by said purchase, the legal owner of said lands."

It might be sufficient answer to this assignment to say that the record does not show that the Supreme Court made any such decision. This is simply another recital of an admitted fact in the decree. There can be no question but that the certificates were in due form, and on their face they conveyed the legal title to said lands to defendants, and this is all that is meant and intended in this part of the decree. The argument is that the Supreme Court erred in affirming this recital in the decree, because said certificates were obtained by fraud. Now, it is certainly clear that the Supreme Court of Iowa did not undertake to determine whether or not said certificates were obtained by fraud. In fact, the opinion of the Supreme Court shows distinctly and affirmatively that no such question was considered or decided in the case. The objection here urged by plaintiff is not an error of law appearing upon the face of the record, but an error, if an error at all, of fact; found from the evidence.

IV.

"The Supreme Court erred in refusing to give any effect to the statutes above named and deciding that the lands enured to defendant under the act of May 15th 1856."

This pretended assignment undertakes to include two alledged errors, instead of setting them out separately and specifically, as required by rule 21, heretofore referred to. It might be sufficient to say, in reference to the first assignment, that the record does not show the Supreme Court of Iowa "refused to give any effect to the U S. statutes named," and in reference to the second assignment, this simply relates to the recital in the decree, of an admitted fact. That is, that said lands were certified to the defendant as land enuring to it under the act of Congress named.

V.

"The Supreme Court of Iowa erred in holding that the certificate to defendant was final and not to be inquired into by them."

In answer to this assignment, it is sufficient to say that the Supreme Court of Iowa made no such decision, and it does not appear in the record.

VI.

"The Supreme Court of Iowa erred in holding, in its opinions, that the land in suit had been claimed by the defendant under the congressional grant of May 15th, 1856, and in deciding that the plaintiff had full knowledge that defendants claimed to own the lands in dispute, and in deciding that the plaintiff recognized the defendant as the owner of the lands in controversy."

Here are three alleged errors contained in one assignment, in violation of the rules of this court above stated, no one of which presents any question of law. The court would have to examine all of the evidence in this case, to determine either one of these questions.

VII.

"The said Court erred in deciding against the right and title of plaintiff as set up in its petition and reply to the Cross-Bill."

Again we say that it is a sufficient answer to this assignment to say that no such question was decided by the Supreme Court of Iowa. The Supreme Court of Iowa did not hold or determine any question relating to the validity of the act of Congress under which plaintiff claims title to this land, nor did they undertake to construe said act.

VIII.

"The said Court erred in deciding in favor of defendant in its claim of title as set forth in its Cross-Bill."

Now, is it not apparent that this pretended assignment does not present any question of law to be determined by this court. It simply involves a new trial of the entire case. The court could not determine this question without investigating all the evidence in the case, and every finding of fact.

IX.

"The said Court erred in holding that defendant had a legal claim on the lands in suit, and in giving the void certified certificate a standing in Court as if valid, when it was a sham and cheat and perfectly null and void; said decree and opinion being bottomed on a denial of a federal right of plaintiff and a misapplication of the federal statutes."

As we have before stated, the Supreme Court did not investigate any question relating to the legality of defendants'

title to the lands in controversy. The decree of the District Court simply shows an admitted fact, that said lands were duly certified to the defendants, and on its face conveyed a legal title. Now, in order to determine whether or not such certificates were "a sham and cheat, and null and void," the Supreme Court of Iowa and this court would have to examine and consider all the evidence in the case relating to the manner in which said certificates were obtained. The Supreme Court of Iowa did not undertake to make this examination. It did not decide any question relating to the validity of said certificates, deeming such question immaterial, but the admitted fact, that said lands had been certified to defendants, was simply recited in the decree.

The other errors included in this assignment that said decree was bottomed on the denial of the federal right and misapplication of federal statutes, is wholly unsupported by the record.

X.

"The said Court erred in deciding that an illegal taxation by inferior state officers could and did not forfeit plaintiffs rights under the aforesaid federal statutes, and transfer the lands to the railroad grant thereby."

Again we repeat that this pretended assignment is wholly unsupported by the record. The Supreme Court of Iowa made no such decision.

These are all the errors that have been assigned, and if we are correct in our position that they present no question to be reviewed by this Court, the controversy seems to be ended. We think it must be conceded that the only question decided by the Supreme Court of Iowa in this case, was that the plaintiff was estopped from claiming the lands in controversy in this suit by reason of the facts set up in defendants answer and Cross-Bill, and established by the evidence in the case. If there is any error in the case, it must be in this decision, as this was the only question decided. Now, we insist that this question cannot be reviewed by this Court for at least two very good reasons.

First, It is not a federal question, and

Second, The question is not presented in this record.

We have presented our views on the first question in our motion to dismiss the Writ of Error in this case, and in relation to the second we say, that there is no finding of facts and no Bill of Exceptions in the record on which to base such assignment. This Court cannot determine this question of estoppel upon this record, without considering and weighing all of the evidence in the case. The estoppel is founded upon facts disclosed by the evidence, and, hence a decision of this question involves a new trial upon questions of fact alone. We repeat there is no finding of facts in the record. There is no Bill of Exceptions. There is no Assignment of Error or claim that the findings of fact are contrary to the evidence. All that could be claimed by plaintiff as a basis for this Court to review the question, would be that of all the facts in the the case, established by the evidence are included and recited in the opinion of the Supreme Court of Iowa. But as before stated we deny that such opinions can be considered or treated in an Appellate Court as a finding of *all* the facts in the case.

This record is voluminous. The evidence relating to this question of estoppel was voluminous and no doubt there are many facts not stated in the opinion that influenced the Supreme Court in coming to the conclusion that plaintiff was estopped from claiming these lands.

The law does not require, as we have before stated, that *all* of the facts upon which a conclusion is based shall appear in the opinion; and, hence, we claim that errors cannot be assigned upon the opinion of the Court as a finding of *all* the facts in the case. That a case cannot be tried *de novo* upon the facts recited in an opinion.

ESTOPPEL.

If we are not correct, in the propositions above stated, if it be true that this court, in a case brought here upon a Writ of Error, will proceed to try it anew upon the evidence, as it would a case brought here by appeal, then we insist that *the facts* relating to said question of estoppel, as disclosed by the evidence, are as follows:

That for several years prior to October 25, 1861, both of the parties to this suit claimed to be the equitable owners of

the land in controversy. The plaintiff claimed that said lands enured to it under the act of Congress known as the Swamp Land Grant, while the defendant claimed that it was the equitable owner of said lands under the act of Congress known as the Railroad Grant. Each party undertook to take possession and control of said lands. The county authorities issued pre-emption certificates thereon to divers citizens of said county. The railroad company notified such pre-emptors, and the county, by a written notice, of their claim to said lands. It sent agents to examine the same, and employed parties to protect timber growing thereon. During this time, each party was urging its claim to said lands, and demanding a certificate therefor from the Secretary of the Interior. On the 25th day of October, 1861, the Secretary of the Interior rejected the claim of the plaintiff to said lands, as swamp lands, and decided that the railroad company, the defendant, was entitled to said lands, and issued certificates therefor. (See this decision on page of the record).

When this decision was made, the plaintiff abandoned all claim to said lands, and from that time up to December, 1869, recognized and treated the defendant and its grantees as the absolute owners of said lands. It regularly taxed and collected taxes thereon as railroad lands from that time, up to the time that the Supreme Court rendered the second opinion in this case. It sold portions of said lands for taxes. It notified parties holding preemption certificates on said lands that the same belonged to the railroad company, and advised them to purchase the same from said railroad company. It loaned school-money to such preemptions and purchasers from the railroad company, and took mortgages on said lands to secure the same. It executed quit claim deeds to the parties purchasing said lands from the railroad company without consideration, simply for the purpose of removing an apparent cloud, upon the titles thus acquired from the railroad company. The Board of Supervisors in June, 1869, made and entered into a contract with said railroad company in reference to the taxes then appearing upon the tax lists of said county against said lands, and remitted a portion of said tax in order to induce said railroad company to build its railroad into and through said county within a certain time.

During this time the railroad company, recognizing the equitable right of the preemptions of parties of said lands, sold and conveyed the same by warranty deed to such preemptions for $1.25 per acre, having paid to the county more than that sum for taxes on the lands. The title to the lands thus passed to the citizens of said county, and after having thus recognized and treated defendants and its grantees as the sole owners of said lands for the space of (9) years, it is advised by his attorney, Mr. F. Davis, a resident of said county, that it can recover, as its property, all of said lands from its own citizens who had paid for it and improved it by giving him one-half interest thereof for his services in obtaining the same, and we insist that there is no equity in plaintiff's claim to these lands, and that the Supreme Court of Iowa was right when it said, that plaintiff under this state of facts, is estopped by its conduct from making such an inequitable and dishonest claim. This conclusion, as you will discover from the Supreme Court of Iowa, is not founded on the facts claimed that the decision of the Secretary operated as an adjudication of the rights of those parties. It is not founded on the claim that taxes were illegally assessed against the said lands by the county officers, but it is founded upon the facts that there was a contest between these two parties for the title to these lands, and that after such contest was decided in favor of defendant, the plaintiff abandoned all title or claim to the lands, and in almost every possible way recognized and treated them as the lands of defendant, and thereby secured and obtained from defendant and its grantees, large sums of money in the shape of taxes. Now we claim that to permit the plaintiff under these circumstances, to claim the land as its property, would operate as a fraud.

This decision does not stand alone, as is claimed by plaintiff's counsel, but is supported by numerous other cases, cited and referred to in the opinions of the Supreme Court of Iowa.

THE INDIVIDUAL CASES.

The decrees entered in this case are not the same as the decree entered in the case against the railroad company you will see by reference thereto. (See record page). While some issues in said

cases were the same as the principal case, others were entirely different and distinct; for instance, in each of the individual cases the defendant set up the special defense that the defendant held a valid preemption certificate on the tract of land claimed by him. This difference was not reached or passed upon by the Supreme Court of Iowa, but we insist that it is good, and if this case is to be tried anew that plaintiff would not in any view of the case, be entitled to a decree against the said purchasers. That each had a valid preemption certificate for the land. That each purchased from the railroad company, at the suggestion and under the advice of the county authorities and under the express representation of said county authorities, that the county did not claim the title to the land, but that they belonged to the railroad company, and, hence, to permit the county to repudiate their title at this time, would act as a fraud on them.

Respectfully submitted,

SHELLABARGER & WILSON,
Attorneys for Defendants.

112-123

OFFICE SUPREME COURT U. S.
FILED
OCT 23 1884
JAMES H. MCKENNEY,
CLERK.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NO. 334-38.

ADAMS COUNTY, PLAINTIFF IN ERROR,

VS.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY ET AL.

In Error to the Supreme Court of Iowa.

DEFENDANTS' BRIEF OF THE EVIDENCE.

T. M. STUART, Attorney for Defendants.

In the Supreme Court of the United States.

ADAMS COUNTY
vs.
THE B. & M. R. R. R. Co. *et al.* } No. 334-38

DEFENDANTS' BRIEF OF THE EVIDENCE.

As we were laboring under the impression that this court would not, in a proceeding on a writ of error, examine the evidence in this case, we did not, in our former brief filed herein, make any reference to the evidence. If we are mistaken in this view of the practice in such cases, then we desire to call the attention of the court to the following evidence upon which the Supreme Court of Iowa based its findings that plaintiff was estopped, as against the defendants, from claiming title to the lands in controversy or denying defendants' title thereto.

I.

Prior to October 25, 1861, each of the parties claimed the right to the lands in controversy. The county claiming under the Swamp-Land Grant and the defendant railroad company claiming under the railroad grant. Each party undertook to take the possession and control of said lands. The county authorities issued pre-emption certificates to divers parties for portions of said lands. (See such certificates, record, pages 462, 497, 564, 566, 574, 577, 496, and copy of pre-emption record, page 425.)

The railroad company notified such pre-emptors, in writing, of its claim to said lands and employed agents to examine the same and protect the timber growing thereon. (See record, pp. 27, 463, 464, 465, 466, 467 and 382.)

III.

On the 25th day of October, 1861, the claim of the county to said lands, as swamp lands, was rejected by the Secretary of the Interior, and they were duly certified to the railroad company as lands enuring

to it under the railroad grant. (See record, pages 78, 95, 399 to 403 inclusive, 579.)

IV.

The county was notified of said decision of the Secretary of the Interior, and the fact that the claim of the county to said lands had been rejected became at once notorious in said county. (See record, pages 580, 581, 582, 583, 584, 585, 586, 587, 588, and 463 to 469 inclusive, and 411, 412, and 413.)

V.

The county acquiesced in such decision of the Secretary, and abandoned all claims to said lands, and from the date of such decision, to wit, October 25, 1861, up to the commencement of this suit in 1869, it recognized and treated the defendant company and its grantees as the sole owners of said lands. That such recognition is shown as follows:

1st. Immediately after this decision was made, a resolution to tax said lands, as railroad lands, was made and adopted by the board of supervisors. (See record, pp. 298, 299, and deposition of John Barnet, 406 and 407.)

2d. It regularly taxed and collected taxes on said lands as railroad lands from the time said decision was made up to 1873, the time that the Supreme Court of Iowa held that it could not tax these lands as railroad lands, and at the same time claimed that it was the owner thereof. (See copies of tax lists, record, pages 261 to 287 inclusive.)

(NOTE.—You will observe from these copies that they are prepared in such manner as to show the manner in which each particular tract was taxed from 1861 to 1874. Each tract is separately traced through the tax-lists for these years.)

3d. In the years 1861, 1862 and 1863, the lands were taxed to "unknown" owner, in pursuance of a custom in said county to tax all lands belonging to non-residents in this manner. (See record, page 224.)

4th. They appear on the tax books with other lands, which are admitted to be railroad lands, which were taxed in the same manner. (See record, page 217.)

5th. All railroad lands in the county appear on the tax books, separate and apart from other lands (See record, pages 217, 218.)

6th. The clerk of the board of supervisors notified said board that said lands appeared upon the tax lists as railroad lands. (See record, pages 411, 412, 413.)

7th. When the railroad company sold any of such lands to individuals, they were taxed to such purchasers. (See copies of tax lists, record, pages 261 to 287, inclusive.)

8th. The county, after its claim to said lands was rejected, sold portions of said lands for the taxes it had levied thereon. (See record, pages 257, 260.)

9th. The railroad company and its grantees paid to the county

large sums of money as taxes on said lands. (See tax lists, pages 261 to 287, and also pages 403 and 405.)

10th. On the 14th day of June, 1869, the county, for the purpose of expediting the building of said railroad in said county, and bringing said lands into market, made and entered into a written contract with the railroad company, in reference to the taxes then appearing on its tax lists against said lands, wherein the company paid to said county the sum of $600 in full of such taxes. (See record, pages 403, 362 and 369.)

11th. When the claim of the county to these lands was rejected, the parties to whom the county had given pre-emption certificates applied to the county officers to protect their titles, and they were advised that the lands belonged to the railroad company, and that they should purchase said lands from the railroad company, which they did. (See record, pp. 463 to 469, 482 and 500 to 508.)

12th. Some of these parties applied to the Commissioner of the General Land Office for advice, and he advised them to purchase from the railroad company. (See record, page 588.)

13th. During this time, that is, between the years 1861 and 1869, the railroad company, without any objection being made on the part of the county, publicly claimed to own these lands, and sold and transferred by warrantee deed the most of them, at $1.25 per acre, to parties who were in possession thereof and had made valuable improvements thereon. (See record, p. 381, and depositions of J. M. King, 369, and A. E. Touzalin, 391.)

14th. In support of the averments of our answer, that the county *acquiesced* in the decision of the Secretary of the Interior in rejecting her claim to said lands, and from that date up to the commencement of this suit *abandoned* her claim to the *lands in* controversy, and *recognized and treated* defendant company as the owners thereof under the railroad grant, we especially call the attention of the court to the depositions of:

J. M. King, page 26.
J. W. Ames, page 29.
D. N. Smith, page 361.
J. M. King, page 369.
John Bixly, page 411.
John Barnet, page 406.
Daniel Richie, page 460.
John N. Arthur, page 497.
A. A. Rawson, page 579.
Homer C. Rawson, page 597.

And also certified copies of county records found on pages 42, 43, 46, 259, 261, 295, 298 and 403.